United States Court of Appeals
for the Second Circuit

APPENDIX

77-7037

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In The

United States Court of Appeals

For The Second Circuit

NATIONAL AUTO BROKERS CORP., et al.,
Plaintiffs-Appellants,

-against-

GENERAL MOTORS CORPORATION, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York.

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

JOINT APPENDIX - VOLUME 8

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PAGINATION AS IN ORIGINAL COPY

A No, I wouldn't.

Q Did you ever tell anyone that Nabcor, an auto brokerage company or any company should not be selling cars?

A No, I didn't.

Q What was your practice with respect to communicating with GM dealers concerning delivery of particular orders?

A We had no contact directly with dealers at all.

Q If a problem involving delivery were reported to you, what was your practice?

A Transfer the communication directly to our distribution department.

Q Is that the distribution department of Chevrolet?

A Right.

Q Did you ever tell anyone that requests for drop shipments require approval of General Motors?

A No.

Q Did you ever tell anyone GM would not drop ship a car or allow its dealers to arrange for a drop shipment?

A No.

Q Did you ever have anything to do with drop shipments or delivery of vehicles?

A No, I don't get involved with drop shipments or deliveries.

MR. SILVERMAN: We have no further questions for this witness at this time.

CROSS EXAMINATION

BY MR. PERSON:

Q Do you know what the term "drop shipment" means?

A Not really, sir.

Q Have you ever heard of one dealer selling a car to a customer and having the customer pick up the car at another dealership?

A We never really dealt with that at all.

Q You never heard of that transaction?

A No.

Q What was your Area Code or what was your Area Code for your phone number?

A In Detroit?

Q Yes.

A 313.

Q Was your number back in 1970 556-5472?

A I think that was one of the telephone lines.

MR. PERSON: We took English's deposition, Mr. Belcher, Karney.

THE COURT: You are not going to call Womack?

MR. KAPLAN: No, your Honor.

THE COURT: Would I draw any adverse inferences from your failure to call Mr. Womack?

MR. KAPLAN: He retired from General Motors several years ago. He lives in the South. Since he's not employed by us you can't properly draw such an inference.

THE COURT: If you got up and told me you tried to get him here but he's ill in a sanitarium, that would be one thing. You are not telling me that.

MR. KAPLAN: That's right, your Honor.

THE COURT: Why haven't you called him?

MR. KAPLAN: He's an old man. He's retired. We think we have put in all the evidence we need on this point.

The fact is that if he made a speech to the district managers about this bulletin, Mr. English told you what the speech was. There is no evidence offered by the plaintiff that Mr. Womack did anything in the world in Buffalo. The only thing in the record about Mr. Womack is that offer. Our objection there was some hearsay, that a couple of dealers mentioned Womack's name to either Mr. Bolling or Mr. Strimple.

If your Honor will recall, Defendants' Exhibit NNN, Mr. Strimple's letter to Mr. Maiorana, says about Womack only that the dealers had said to Strimple that they had learned that Strimple was not a qualified fleet. Strimple was not. We don't dispute that. Therefore, we have nothing to answer with respect to Mr. Womack. That really is the short of it.

THE COURT: In other words, your position is that he passed this out to the district managers. Why would he do that?

MR. KAPLAN: There is nothing to be drawn from it.

THE COURT: The thing to be drawn is that he wanted to convey to the district managers the feelings of the dealers about Nabcor and DABS, or whatever else.

MR. KAPLAN: That's not consistent with what Mr. English said and that's the only evidence on the point. That is, that Womack read part of it to them and said he wanted to be sure none of them discussed the matter with dealers. I would argue that that supports our position.

MR. PERSON: The record shows that he handed out a copy of the bulletin to each district manager and one of them denies ever having received one.

THE COURT: Who denies that?

MR. PERSON: Mr. English.

THE COURT: What's the evidence that he handed it out?

MR. PERSON: The documents in the files of General Motors.

MR. KAPLAN: DiSimone testified that Womack told him he had given out copies.

THE COURT: There are documents this was done?

MR. PERSON: There are some documents I'm going to offer --

MR. KAPLAN: Plaintiffs' Exhibit 339, which we offfered on DiSimone's testimony, is in evidence already. It's Mr. DiSimone's account of this conversation with Mr. Womack.

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process,and I find it very difficult to believe that he would take up the trial of this action having not participated in this preliminary hearing.

I think he would have problems and give us all trouble to take it up without having participated here.

My plans are to start this trial tomorrow. We will start at 10 o'clock tomorrow.

FREDERICK C. WATKINS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SILVERMAN:

Q Mr. Watkins, you were employed by the Chevrolet Motor Division of General Motors from 1946 until your retirement in 1974, correct?

A That is correct.

Q You were the interim branch manager of Mid-Town Chevrolet from the time Mid-Town was established in December, 1966, until April, 1967, correct?

A That is correct.

Q Prior to the time you were contacted by General Motors counsel in connection with this litigation, had you ever heard the name Frank Maiorana?

A No, I did not.

Q Have you ever spoken with Mr. Maiorana?

A No, I did not.

Q Have you ever spoken with anyone connected with Nabcor?

A No, I have not.

Q During the time you were interim branch manager at Mid-Town did Walter Englert ever bring you to the telephone to speak with Frank Maiorana or anyone from Nabcor?

A No, he did not.

Q Did you ever tell anyone it was not General Motors or Mid-Town's policy to sell to non-franchised dealers?

A No, I did not.

Q Mr. Maiorana testified earlier in this trial that he had a conversation with you and certain things were said. I read from the transcript of this trial things which Mr. Maiorana claims you said to him in this telephone conversation.

THE COURT: What page?

MR. SILVERMAN: 376, your Honor.

THE COURT: Let me get that, please.

MR. PERSON: It isn't correct that he claimed to have spoken to Mr. Watkins. He said to somebody --

THE COURT: That is right. Let us get the testimony. Page 376?

MR. SILVERMAN: Yes, those are the statements. 376, lines 15 through 17, are Mr. Maiorana's description of the person whom he spoke with. He describes that person as the General Motors manager.

THE COURT: I will read this very quickly, but give me a minute.

Go ahead.

Q Reading from page 376, starting at line 16, this is what Mr. Maiorana claimed in the trial and you were the person whom he identified and said to him, "Well, we are not in business here to make a profit. We are here to hold up the price for outlying dealers. When people come here we are going to hold the price high so they can go back to their dealers and get a price equal or lower to what we give them, and we are not going to sell you automobiles so that you can bootleg them at a cheaper price and compete with those dealers."

Did you ever make such a statement, Mr. Watkins, to anyone?

A No, I did not.

Q Mr. Maiorana testified further about this conversation and he claimed that the person said the following, and I read from page 377, starting at line 7:

"We don't sell cars to compete with our dealers. Our policy is toing to be to hold the price high so that our outlying dealers can get a decent price for their cars. That is the way it is going to be."

Did you ever say that to Mr. Maiorana or to anyone else?

A No.

Q During the time you were at Midtown did it ever come to your attention that there were some orders which had been placed by an automobile broker with Don Allen?

A Yes.

Q How did it come to your attention, sir?

A I believe it was Mr. Englert that brought it to my attention.

Q What did he tell you, to the best of your recollection?

A He told me that there were some orders from a man who was in the auto brokerage business who had offices in the General Motors Building and he wanted to know what we should do about them.

Q Did he mention anything about price in this conversation?

A I don't recall.

Q What did you do following this conversation with Mr. Englert concerning this matter?

A I told Mr. Englert that I thought we should get some legal advice on the matter, because I was new in this place, and I went to see an attorney on the General Motors staff who was in the General Motors Building.

Q Why did you want legal advice on this matter?

A Well, I was aware of the fact that there had been a case in California that might bear on something like this, and I thought I better get a legal interpretation as to how I should act.

Q Had you any experience prior to the time you were interim branch manager in Midtown in running an automobile dealership?

A No, I had not. I had never worked in one.

Q You had worked for Chevrolet Motor Division of GM?

A That's right.

Q Did you speak with an attorney?

A Yes.

Q Do you recall if Mr. Englert was with you?

A He could have been. I don't recall.

Q Following your communication with the attorney did you have any communication with Mr. Englert or anyone else at Midtown concerning this matter?

A Did you say prior to my meeting with the attorney?

Q If I did I misspoke. After you met with the attorney.

A No, I did not.

Q After you met with the attorney did you speak with Mr. Englert or anyone else at Midtown?

A Yes.

Q With whom?

A Mr. Englert.

Q What was said?

A I told him we should honor the orders.

Q Did you and Mr.Englert discuss what to do about future orders from this concern?

A I discussed this with the attorney.

Q Did you discuss it with Mr. Englert?

A I probably did. I'm not quite sure.

Q Do you recall what was said?

A I told Mr. Englert that we would handle that matter if it came up, if we received more orders.

Q About how long was it from the time Mr. Englert first brought this to your attention to the time of the conversation which you are now telling us about?

A I believe that all took place in one day.

Q Did you have any subsequent communications with Mr. Englert concerning this matter?

A Yes, I did.

Q What were they?

A Some time later I asked him what was the situation, had we received any more orders and what had we done.

Q What did he tell you?

A He told me that we had filled some of the orders, that others had been cancelled, and that he had received no further orders.

Q Prior to the time you were interim branch manager at Midtown you worked at the Chevrolet New York zone office?

A Yes.

Q For how many years were you there, at the zone office?

A Approximately ten.

Q Then from May, 1967 until your retirement in 1974 you were zone manager at Chevrolet's Newark, New Jersey zone, correct?

A Correct.

Q In 1969, that is, during the time you were zone manager at Chevrolet's New York zone, did you have occasion to communicate with Chevrolet's New York zone?

A I believe you said when I was zone manager of the New York zone.

Q When you were in the Newark zone did you communicate with the New York zone?

A Yes.

Q How frequently?

A I would go to meetings where they were in attendance perhaps once a month.

Q Did you speak on the phone with the New

York zone?

A From time to time.

Q Did you see personnel lists identifying the employees of New York zone during that time?

A We had personnel lists from all of the zones in the Atlantic Coast region.

Q Where were the offices for the New York zone during 1969?

A Bethpage, Nassau County.

Q Who was the zone manager of Chevrolet's New York zone during 1969?

A That was Mr. W. L. Lawler.

Q Was there any other zone manager in Chevrolet's New York zone during 1969?

A No.

Q Did you know who the fleet representat-tives were in Chevrolet's New York zone during 1969?

A I believe so.

Q Do you know how many there were in 1969?

A I think there were four.

Q Do you recall their names?

A Fred Ritter, Don Fogg, Jim Conlon and John Widamore.

Q Was there ever a fleet representative

over. Mr. Englert became the fleet manager after Chevrolet took over, immediately after.

Q Immedaitely after?

A Yes.

Q Was there anyone else in the fleet department at that time after the takeover?

A Yes.

Q Who else other than secretarial help?

A I can't remember the names. Sorry.

Q Any males?

A Yes.

Q Any representatives, fleet representatives?

A Yes.

Q About how many?

A There were two or three.

Q Did Midtown Chevrolet make a profit during your period as the interim branch manager?

A I don't know. The reason I say that, if I may, is because we had problems getting a financial statement put together in the few months I was there and I don't really know whether they did or not. I don't suspect they did.

Q Did you have any monthly reports. We

A We had some but they were fragementary. We had not put out a financial statement yet.

Q Did Midtown Chevrolet ever sell to any resellers of automobiles during your period as interim branch manager?

A The only one I know of is the orders we were talking about.

Q Was it a policy not to sell to resellers?

A No, it was not.

Q Did you seek to make sales to resellers, Midtown Chevrolet, that is, during your period as interim branch manager?

A I don't recall. I would not really know what went on the fleet department unless someone came to me and told me.

Q Do you recall whether the absence of any price on the orders for the Nabcor vehicles was discussed prior to your conference with the attorney of GM?

A No, I don't believe it was.

Q You didn't know what the price would be?

A No.

Q It could have been a retail deal?

A Every deal has a different price on it. It's always a negotiated price, retail or wholesale.

Q You didn't check to see what the price was?

A No.

Q Why not?

A It didn't occur to me. I don't believe I ever saw the orders.

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Q In other words, whether Nabcor orders were retailed or on a wholesale basis would not have made any difference to you at that time, is that correct?

A That's right.

Q Was the attorney's name Wagerman?

A Yes, it was.

Q Did you ever speak with him again about Nabcor?

MR. KLEINBARD: I object to that.

Q Concerning Nabcor?

A I don't recall talking to him again.

Q Do you recall whether you spoke with Mr. Wagerman before January 1?

A No, I don't recall.

Q It could have been before January 1?

A It could have been.

Q Did you ever speak with Mr.Fogg concerning Nabcor?

A I dont recall.

Q Or Mr. Karney concerning Nabcor?

A I don't know Mr. Karney.

Q You testified that you did not know any person as Jack Douglas, who worked for General Motors. Have you heard from anyone whether there is a Jack

Motors about the profit picture of Mid-Town?

A I am sure they did, but I can't recall specifically.

Q Anyone express a concern about the profit picture as it was during your management of it?

A No.

MR. PERSON: No further questions.

THE COURT: Anything further, Mr. Silverman?

REDIRECT EXAMINATION

BY MR. SILVERMAN:

Q Mr. Watkins, directing your attention to your conversation with Mr. Englert before you spoke to the attorney, do you recall one way or the other whether you discussed the price for which the vehicles were to be sold?

A No, I do not.

MR. SILVERMAN: No further questions, your Honor.

RECROSS EXAMINATION

BY MR. PERSON:

Q Any question about whether the order was retail or a fleet order? Was there any discussion between you and Mr Englert concerning whether the Nabcor orders were fleet or retail orders?

A Yes, it was a fleet order.

Q How did you know?

A It was referred to as a fleet order.

Q What do you have as referred to a fleet order?

A Well, I would think it was a fleet order because it is a multiple order because they are considered fleet orders.

Q You are projecting that knowledge and arriving at your conclusion that it was a fleet order because there was more than one order?

A That's right.

Q Were you aware of the fleet prices at that time?

MR. SILVERMAN: I object to this as beyond the scope of redirect examination.

THE COURT: I will allow it.

A You say fleet prices?

Q Right.

A We didn't have any standard price for cars to fleet as opposed to retail. Every order was a negotiated order and we wouldn't have a standard fleet price for anybody.

It was a matter of what the buyer wanted to pay and what the seller wanted to sell for.

Q How familiar with you with Mid-Town pricing practices back in the beginning of January, 1967?

A I really don't know how to answer the question, how familiar was I.

Q You were experienced in --

A We didn't set a price for something. A salesman would have a customer on a car and he would negotiate with the customer and then go into the sales manager and see whether the price was acceptable or not.

Q How did you set a $75 price without consulting Nabcor?

MR. SILVERMAN: I object to that question.

THE COURT: Sustained.

Q Do you know how the $75 price was set?

MR. SILVERMAN: I object to that.

THE COURT: Sustained. You have to lay more of a foundation.

Q Did you discuss with Mr. Karney the prices at which a car --

THE COURT: Who?

Q With Mr. Englert the price at which any of these ordered cars would be sold to Nabcor?

A If I did, I don't recall.

Q You don't recall whether there was dis-

FREDERICK V. BLESSE, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KLEINBARD:

Q Mr. Blesse, where do you reside?

A New York City.

Q Have you been employed by GMAC since October 10, 1951?

A I have been employed by General Motors. I was originally with General Motors Credit Corporation which was merged into GMAC.

Q That is since 1951?

A Yes, sir.

Q Will you direct your attention to the year 1967 and the first three months of 1968.

Can you tell me where you were employed at that time?

A In Debroit.

Q In what department?

A TEF Office.

Q Will you explain to the Court the TEF office?

A Trucking & Equipment Financing Office. We handled commercial equipment and fleet and leasing transactions.

Q That was located in Detroit?

A In Detroit.

Q Could you explain what your primary responsibilities were while an employee at Detroit in the TEF Office?

A Credit approvals; approving fleet transactions or on occasion individual trucks or heavy equipment transactions.

Q Pursuant to that responsibility were you familiar with the financing plan in effect during the year 1967 and during the first three months of 1968?

A Yes,sir.

Q Did the GMAC have a retail passenger car fleet financing plan during that period?

A Yes.

Q Could you describe briefly who was eligible for financing under such a plan?

A A credit worthy customer who operated 20 units in the previous year or with the purchase at hand would have a fleet of 20 or more units.

Q Was there any requirement with respect to the registration of those 20 cars?

A Yes.

Q Can you tell us what that was?

A They should be registered to the customer or, if it was a leasing firm, the leasing firm.

Q To what extent was eligibility in any way dependent upon having a fleet certificate?

A None.

Q Can you just describe briefly for us what the procedure was for processing applications under this plan?

A The transactions would originate at the branch and for any reason it exceeded the branch approval authority which most of them were submitted to us, we had a regular form which they used and they submitted the proposal with the financial information and asked us for our consideration.

Q Can you give us one or two illustrations of an application which required TEF approval?

A If it was a sub-standard rate or if the dollar amount exceeded, in those days, $50,000 for one customer, it would require TEF approval. There were other considerations.

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Q I show you what has been marked as Defendants' Exhibit A and ask you whether you have seen that before?

A Yes, sir.

Q Can you tell me what it is?

A It is an application for approval under the finance plan submitted by the branch to the TEF Office.

Q Which branch, can you tell me from looking at that exhibit?

A The Philadelphia branch.

Q What about that particular application, Defendants' Exhibit A, was there that caused it to be submitted to the TEF Office?

A The rate and the dollar amount to be financed for one customer.

THE COURT: What do you mean, the rate?

THE WITNESS: We had standard rates which we felt were the normal rate and if it was below that we would have had to approve any concession.

Q So that the rate requested was below the norm, is that correct?

A That is correct.

Q And the dollar amount of the credit was what?

A $67,280.

Q What was the dollar limit?

A $50,000 at the branch level.

Q It exceeded the dollar limit as well?

A Yes, sir.

THE COURT: Is that an application on behalf of Narcor?

THE WITNESS: Yes, your Honor.

THE COURT: May I see it?

(Handed to Court.)

MR. KLEINBARD: It is already in evidence, your Honor, but I will ask questions about it.

Q I show you a memorandum dated March 8, 1968, purporting to be from you to Mr. Musselman, and ask you if you can identify that memorandum?

THE COURT: What is the exhibit number?

MR. KLEINBARD: That has been premarked as Plaintiffs' Exhibit 85.

Q Can you identify that?

A Yes.

Q What is it?

A It is my memorandum to Mr. Musselman, which I wrote after I had examined the application.

I asked for a current financial statement on Nabcor, the reason why we were being requested to give a preferential rate, and I asked for advice as to the number of cars that Nabcor had in their current fleet.

Q Did you ask for anything else?

A I also asked the branch if they had reviewed the rental or lease document used by Nabcor.

MR. KLEINBARD: I offer the document in evidence, your Honor.

MR. PERSON: No objection.

THE COURT: Received.

xx (Defendants' Exhibit A-5 for identification received in evidence.)

Q I show you a document premarked Defendants' Exhibit B-5 purporting to be from Mr. Musselman to you dated March 12, 1968.

I ask if you can tell me what that document is?

A It is Mr. Musselman's reply to my memorandum.

THE COURT: What is the date of the reply?

MR. KLEINBARD: March 12, 1968, your Honor.

Q Can you either from recollection or by refreshing your recollection by looking at the document, tell me what he said?

A Yes. He told me an audited financial statement was not available. It offered the principal stockholder guarantee on the transaction in lieu of a financial statement.

Q Who was the principal?

A Mr. Frank Maiorana.

Q What else?

A He said that the purchaser was agreeable to our standard rate and it was reported that there were 1100 units on lease.

He also said there was no printed rental or lease document.

Q Did he say anything else?

A He made a remark about the financial statement that he submitted.

Q Just look at the last sentence of the memorandum, Mr. Blesse.

A That is what he said, no printed rental document, and would not do so until the fleet was purchased.

Q Annexed to that March 12 memorandum are several documents. Can you identify them for me?

A One of them is the financial statement on Mr. Maiorana.

Q And did you look at that when you received it?

A Yes.

Q Did you make any observations?

A Yes, sir.

Q What is it that you observed?

A That the principal portion of the net worth was a $600,000 asset listed as Nabcor, Inc.

We have no information on Nabcor and therefore were unable to evaluate that as to whether it was worth that or not.

Q In addition to the guarantor's statement by Mr. Maiorana there were other documents annexed?

A Yes. There were property checks on the real estate to verify the ownership and mortgages.

Q What else?

A A credit report from the credit bureau.

MR. KLEINBARD: I offer the exhibit in evidence, your Honor.

THE COURT: Any objection?

MR. PERSON: No objection.

THE COURT: Received.

xx (Defendants' Exhibit B-5 for identification received in evidence.)

Q Would you look at Exhibit B-5 in front of you, Mr. Blesse.

I direct your attention to the righthand corner opposite No. 3. Is there an arrow there?

A Yes.

Q And a questionmark onthe next line?

A Yes.

Q Is that in your handwriting?

A I couldn't positively say, but I would imagine that I probably made that notation.

Q What did that notation indicate to you?

A Well, it seemed unusual to me that a company would have 1100 units in lease and not have a leasing document.

Q Did you respond to Mr. Musselman's memorandum, which is Defendants' Exhibit B-5?

A Yes, sir.

Q I show you a memorandum dated March 19 from you to Mr. Musselman, and ask you whether that is your response?

A Yes.

MR. KLEINBARD: That is premarked as Defendants' Exhibit C-5, and I would offer it in evidence, your Honor.

MR. PERSON: May I see it?

No objection.

THE COURT: Received.

xx (Defendants' Exhibit C-5 for identification received in evidence.)

Q Can you just tell us what your response was?

A I replied to Mr. Musselma.. and explained our feelings regarding the personal guarantee and said we continue to feel that the credit decision should be based on the credit worthiness of Nabcor, the principal obligor, and again asked for a financial statement on the firm.

And I also expressed my feelings that a company with 1100 units in lease should have a written lease document and it seemed unusual they didn't.

Q Did you ever receive any further information from either Mr. Musselman or anybody else from GMAC branch in connection with the application for financing?

A No, sir.

Q Did you ever reject the application?

A No, sir. That was the last time I had anything to do with it.

Q Did you ever inform the Penn Central Bank that it should not grant credit or financing to Nabcor?

A No, sir.

Q Or request anybody else at GMAC so to do?

A No, sir.

Q Did I say Central Penn Bank?

A No bank.

MR. KLEINBARD: I have no further questions.

THE COURT: Cross-examine.

CROSS EXAMINATION

BY MR. PERSON:

Q First of all, let me ask is the TEF an office of GMAC?

A Yes, sir.

Q Was GMAC during this period in 1968 a business?

A I beg your pardon?

Q Was it a business?

A Was GMAC a business?

Q Yes.

A It was a financing company.

Q It was in the business of making profits?

THE COURT: Yes, I am sure they are.

Q Maximizing its profits?

A Yes, to the extent any company does.

Q Could you tell me in connection with your desire to maximize profits why GMAC would not give financing to persons who only lease ten cars?

A We would give financing to them, but on a different plan. We have a regular retail plan that we finance people one car.

originated from dealerships and then are presented to GMAC.

Q But we were dealing with a commercial transaction?

A That would still originate at the dealership.

Q Were any of these guarantees of transactions by GM commercial transactions?

A Yes.

Q Did any of these originate with GMAC, from the dealer to the GMAC?

A After the deal was presented to GMAC it would be presented to the manufacturer.

Q With a recommendation for approval?

A Yes.

Q If the Nabcor transaction had been approved by you would the next step have been to go to manufacture?

A Yes.

Q In Detroit?

A Yes.

Q The GM Building you went to?

A Yes.

Q The same office you went to?

A No.

Q Which office?

A The Nabcor transaction was a Chevrolet transaction and I was in the fleet sales department, which is a different office.

For the Polk books is what you are referring to?

Q Yes.

A Yes.

Q Which office was that?

A A different office. Chevrolet maintained a different office for their fleet sales department.

Q What office of GM would be the one you would have gone to for approval of the Nabcor transaction, if it developed that far?

A If the deal had progressed that far it would have gone to the Chevrolet Division, which has a fleet and finance office in the building.

Q Have you ever spoken to anyone in that department of Chevrolet concerning Nabcor?

A Not that I can recall.

Q What was wrong with the original interest

Q About how much?

A I have no idea.

MR. PERSON: No further questions.

MR. KLEINBARD: I have two questions, your Honor.

REDIRECT EXAMINATION

BY MR. KLEINBARD:

Q In all of the applications for GMAC financing was it your practice to look into the creditworthiness of the applicant?

A Yes.

Q And that's notwithstanding the fact that you may have recourse to the dealer or manufacturer?

A Yes.

Q Can you explain why you do that?

A The customer is the primary obligor and we look to them and their ability to pay us.

THE COURT: This is so obvious. You want to know what the obligor is; you do not want to go after security or guarantees.

MR. KLEINBARD: All right. Mr. Person was drawing that out on cross.

THE COURT: I know that.

Q There was some reference to a lease

document and why you wanted to look into it. Elaborate the reasons as to why you wanted to look into the form of lease.

A As I said, the lease agreement between the lessor and the lessee is to a certain extent the underlying security of the loan because the terms and conditions of the lease should provide an adequate cash flow for the lessor to make his payments.

Q How about questions of title?

A There are certain types of lease documents where the title is questionable as far as if a leassee defaults.

MR. KLEINBARD: Nothing further.

RECROSS EXAMINATION

BY MR. PERSON:

Q Were you aware that the application was to buy cars to put on rental?

A Yes.

Q This is an application to buy cars to put on daily rental?

A Yes.

Q Were you aware of that?

A Yes.

Q What lease agreement are you referring to?

A I was advised that the Nabcor reportedly had 1100 units on lease.

Q Long-term lease?

A They did not tell me.

Q You made no inquiry?

A I asked to see a copy of the lease document or rental document.

Q So it was not the absence of a rental document that caused you concern, is that correct?

A Would you please rephrase that.

Q Did you see any rental document? Did Nabcor have a rental document?

A I was not shown any kind of lease or rental document.

Q Was your concern that you did not see a document covering the 1100 cars? Was that a primary concern of yours?

A It seemed unusual that there was no such document in existence.

Q That's a standard request that you make of any person that borrows money or applies to borrow money from GMAC?

A No. Only in the case of where we were dealing with lease and rental companies.

MR. PERSON: No further questions.

MR. KLEINBARD: No further questions.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Any further witnesses?

MR. KAPLAN: If your Honor please, that's the last witness for the defense. I have one more exhibit which I would like to offer, Defendants' Exhibit GG for identification, which is a copy of a GM fleet certificate for the year 1962. The reason for this offer, your Honor, is because of the question you raised yesterday. This fleet certificate for 1962 is in all material respects the same as the one for 1968, '9 and '70. Whatever GM fleet certificate it was it for years before there was a Nabcor.

THE COURT: Any objection?

MR. PERSON: No objection.

THE COURT: It is received.

(Defendant's Exhibit GG was received in evidence.)

xx THE COURT: Any further witnesses?

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MR. KLEINBARD: No, your Honor, but I would like to renew an application which I made earlier during the course of the hearing and which you asked me to defer, and that is to strike the testimony of Mr. Maiorana with respect to George Zibold, the deceased, his conversations with George Zibold. That was the $9000 clerk that he claimed to have had a conversation with.

THE COURT: Motion denied.

Is there any further evidence --

MR. KLEINBARD: May I make the same application with respect to Mr. English?

THE COURT: Motion denied.

Any further evidence by anybody on the preliminary hearing?

MR. KLEINBARD: No, your Honor.

MR. PERSON: I was willing to present witnesses who would go into each and every one of these transactions, as I had indicated earlier, to show that the GM dealers had refused to deal with Nabcor for the reason that Nabcor did not have a fleet certificate. I don't know if we have --

THE COURT: I don't know what you are talking about. You rested subject to

pga

certain things, some of which may not be completely covered. You were going to put in some documents and so forth. I don't know what you are talking about.

If you say you could put on a lot of dealers to describe what General Motors told them, well, that's something that was of great importance if you were going to do it on your earlier case.

MR. PERSON: I was only going to elaborate more on what I thought was your suggestion that we do so. I thought that I had made the record clear that the testimony would be from my witnesses who had been on already that dealers told them they wanted a fleet certificate and they would not deal with us otherwise. I think the record is abundantly clear in that but I wanted to make sure.

THE COURT: You think it is abundantly clear, then that's it. It's up to you.

This is the seventh day of a preliminary hearing. We canvassed this exhaustively. We have to get before a jury tomorrow.

The case is not being dismissed or a verdict is not being made, handed down, this after-that.

THE COURT: All right.

MR. PERSON: Also, what Mr. Kleinbard has been saying is a total distortion of many parts of the record and he is very glibly passing over a lot of things, mischaracterizing, and otherwise distorting what is a case.

For example -- the case is a group boycott case involving a white list, and in effect the list of GM fleet certificates is a white list where, if a company is not on that list, the dealers refuse to deal. We brought that to the attention of General Motors and they did nothing about it.

THE COURT: I have to put my ruling on the record. We have had a great deal of discussion prior to this morning. I think we can bring this to a conclusion.

The framework for having this preliminary hearing was set forth at the outset and I won't repeat that. One thing left open at that time, subject to hearing the evidence, was the precise standard which should be applied.

The defendant General Motors relies

on the standard announced in United States vs. Geaney and United States vs. Projanski, 417 F. 2d 1116, and 465 F. 2d 123. That standard requires that there be a preponderance of evidence consisting of evidence other than hearsay utterances of co-conspirators, that there be a preponderance of such other evidence showing General Motors' participation in the alleged conspiracy before the hearsay utterances of co-conspirators are admitted.

The plaintiffs argue that there is a substantially lower standard which they are required to meet. They refer to this as a prima facie showing.

The basic problem that I am required to resolve does not really depend on the technicalities of some mechanical rule. The real question is whether it is fair and appropriate to permit the plaintiffs in this case, who are the witnesses we are talking about basically, to get on the stand and testify to large numbers of instances of automobile dealers and others telling them -- the "them" being the automobile dealers and others -- that General Motors had ordered them not to sell cars and so forth.

In other words, the proposal is to have such testimony as the following in numerous instances:

Plaintiff Frank Maiorana would take the stand to testify that car dealer X told him that a General Motors representative had told the car dealer that the car dealer could not sell automobiles to plaintiff Nabcor. We would therefore be having the testimony about General Motors' activities and statements coming in through an out-of-court person who was not observed by the jury and who would not be able to be cross examined before the jury.

Of course, the rule of law is that if there is a sufficient showing that the auto dealer is involved in a conspiracy with General Motors and is therefore acting for General Motors, then the auto dealer's statements made in the course of the conspiracy are binding upon General Motors and admissible against General Motors. But the question is in this case whether there is a sufficient showing of General Motors' involvement in such a conspiracy to overcome the threshold problem and permit the admissibility of such statements.

If the standard is preponderance of the evidence, a showing of the preponderance of the evidence of General Motors involvement in a conspiracy, if plaintiff was required and is required to meet this standard, then I am convinced on the basis of the evidence at the preliminary hearing that such standard is not met.

I will go into the evidence in more detail in a minute but I come to the suggestion of another standard.

I believe what plaintiffs are suggesting, by way of what they call the prima facie standard, is simply that if the plaintiffs' witnesses are able to take the stand and testify on direct examination to statements and acts by General Motors indicating conspiratorial activity, this is sufficient. They, in effect, are urging the court not to weigh credibility, not to give much or any weight to rebuttal testimony or, indeed, even to cross examination. In other words, their proposal in my view would permit no real finding of fact under any standard by the court in this preliminary hearing on this threshold question. I would simply be involved in seeing whether the plaintiffs' witnesses mouth the words on the stand in their direct testimony, and if they so mouth the words the door is open for all the hearsay declarations of conspirators. I cannot possibly accept that standard. I think it would be grossly unfair and an abdication of the function of the court on this most serious question.

I must say that if all that was required here was that certain witnesses for the plaintiffs get on the stand and mouth certain words, indicating conspiracy by General Motors, they have done that, and if that is enough to get the conspirator hearsay testimony in, then it should go in; but, as I say, I cannot believe that that minimal showing, if you can even call it a showing, is enough.

I would approach it from another standpoint and speak in something approaching a recognized standard of proof. I would say with confidence that the great preponderance of the evidence, the very substantial preponderance of the evidence on this hearing, on the basis of the evidence at this hearing, is in favor of

General Motors, positively negating the inference of any conspiratorial activity.

In my view, the record is such, on the basis of the evidence at the preliminary hearing, that I would have to hold that the evidence negates such a conspiracy beyond a reasonable doubt.

If I were sitting on a criminal case and I were judging the evidence at the preliminary hearing and putting the burden of proof on General Motors under a criminal standard, I would hold in favor of General Motors.

This is how strongly I feel about the degree of the proof in weighing the two sides, and I have no doubt that that's a correct conclusion.

The seven days of the hearing have produced a great deal of evidence both by way of testimony and exhibits. I will not attempt to make full findings of fact at this time, but I believe it is sufficient to illustrate my general conclusion if I mention a few examples.

Starting at an early point in the chronology, there is the claim relating to Mid-Town Chevrolet.

It appears that in December of 1966 an independent Chevrolet dealer in New York City by the name of Don Allen Chevrolet was taken over by General Motors. The dealership then became known as Mid-Town Chevrolet and was a directly-owned General Motors outlet for Chevrolets.

It further appears that plaintiff Nabcor had made an agreement prior to the takeover by General Motors to purchase 10 or so cars for $25 over the dealer price.

Plaintiff Frank Maiorana testified that after Mid-Town Chevrolet came into being as a General Motors' outlet, he spoke to a Mr. Englert there who said that he had orders not to sell to Nabcor.

Frank Maiorana testified that Englert put Englert's boss on the phone who said that Nabcor was

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bootlegging, but he, nevertheless, agreed to provide these 10 cars but no more.

According to Frank Maiorana's testimony, two cars or so of these 10 were delivered. The others were not delivered,and Nabcor obtained the cars from other sources; but the clear purport of Frank Maiorana's testimony was that this was an instance where employees of General Motors acted, and expressly admitted that General Motors through Mid-Town Chevrolet was attempting to shut off the supply of automobiles to Nabcor.

Maiorana gave a rather vivid and lurid account of what he was told by Mid-Town Chevrolet General Motors' personnel about the idea that Mid-Town is in the business of holding up the price to protect the other dealers, and so forth.

The version of Frank Maiorana was conclusively rebutted both by contradicting testimony and by documents which thoroughly supported the contradicting testimony. I won't go into a long enumeration of the details on this, but the fact is I am convinced that there were no such conversations between the Mid-Town personnel and Frank Maiorana as alleged; there were no statements indicating an attempt to shut off Nabcor's supply of those 10 cars,

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or any other cars.

The facts are reduced to as simple a form as I can state here: that the Nabcor personnel who dealt with Mid-Town changed back and forth over a period of several days on whether they did or did not want to buy some or all of the 10 cars which had been ordered. The fact is that 8 of the 10 cars were cancelled strictly at Nabcor's initiative, and the only reason that Nabcor only received two of the cars was simply because of Nabcor's own desires in the matter.

There was another line of proof relating to complaints which Frank Maiorana said he made to a Mr. Belcher in December of 1967. Mr. Belcher was the staff assistant to the chairman of the board of General Motors.

Frank Maiorana testified that he went to Mr. Belcher and specifically claimed that he had been denied cars by a specifically named Buffalo Chevrolet dealer, and that a Buffalo Chevrolet General Motors' employee by the name of English had made statements and taken actions to shut off the supply of Chevrolets to Narcor in Buffalo.

Maiorana, as I said, claimed that he specifically mentioned the dealer, and he specifically mentioned English.

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He also claims that he told Belcher about a company called Rohrer Chevrolet, and efforts by General Motors to prevent that dealer from selling to Nabcor.

He also claims that he threatened suit against General Motors and referred to a prominent antitrust action involving General Motors' activities in Los Angeles, which had been decided in 1966 against General Motors.

Maiorana claims that he asked Belcher to write letters to General Motors' dealers allegedly clearing some misapprehension that they were not to sell to Nabcor. Maiorana claims that Belcher suggested, on Belcher's own initiative, that a so-called fleet certificate would assist in the matter and referred Maiorana to one or more General Motors' officials who could help get the fleet certificate.

Maiorana then testified about his dealings with a Mr. Karney of General Motors in connection with attempting to get the fleet certificate.

The import of Maiorana's testimony is that he was denied the fleet certificate under circumstances and with express statements by one or more

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General Motors' personnel indicating that not only would the fleet certificate not be furnished but that General Motors would continue its alleged attempts to shut off the supplies of cars to Nabcor and its associates.

This whole line of proof offered by the plaintiffs was rebutted by testimony and by well-documented testimony to such a degree as to be conclusive. The documents proved, to my satisfaction, that no specific complaints were made to Belcher aside from a general statement that there was trouble in Buffalo and that General Motors was attempting in Buffalo to shut off the source of cars.

But the proof is convincing that there was an attempt by the General Motors' personnel to find out from Maiorana specifically what dealers and what General Motors' persons or employees in Buffalo were involved, and the proof is further convincing and, indeed, thoroughly documented that Maiorana deliberately avoided mentioning any names, any dates, any precise circumstances, and I am convinced beyond any question that the reason for this was that Maiorana knew that the matter could not be investigated with any outcome in his favor, and he was deliberately attempting to avoid having General Motors make such an investiga-

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tion. In other words, the proof is that this was simply a vague threat or a vague accusation designed to force some kind of action from General Motors but not an accusation grounded in any fact.

2 The story about the attempt of Maiorana to get the fleet certificate is another instance where the proof has turned out decidedly against the plaintiffs and in favor of General Motors.

Without going into detail, it is clear that Nabcor did not comply with the standard general requirements of General Motors for the attaining of the fleet certificate.

It is further clear that Maiorana committed fraud in his attempt to obtain the certificate; he misrepresented the nature of Nabcor's business, and he misrepresented the extent of the so-called fleet then possessed by Nabcor.

One can only say that General Motors was well advised to deny the fleet certificate.

One could really go on and on with the same kind of analysis of the evidence.

I have to bring this to a close. I will mention something regarding Buffalo since it figured prominently in the original charges in this action.

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Three of the plaintiffs' witnesses testified that a Chevrolet employee by the name of English made statements on two or three occasions to the effect that if any Chevrolet dealers in his area were caught selling cars to Nabcor such dealer, or dealers, would not get cars from General Motors. This was the alleged threat or statement of English in substance.

The trouble is that this statement or these statements were supposed to have been made in December of 1967 and the statement or statements of English were supposed to have been immediately directed to a dealer by the name of Clements-Gillogly or Hamister-Gillogly, depending on what the particular name of the dealership was. The further trouble is that the proof shows that Gillogly dealership started selling Chevrolets to the Nabcor franchisee in Buffalo, accompanied by the name of General Auto Sales & Leasing, Inc., and that the Gillogly dealership started these sales in January, 1968. The record shows that Gillogly accepted an order for a Chevrolet from General on January 30, 1968, and that regular deliveries of Chevrolets by the Gillogly dealership to General commenced in April of 1968 and went at least through the years 1969.

There were other General Motors' vehicles

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obtained in the Buffalo area in 1968 and 1969 from other General Motors dealers.

Further, three witnesses denied any such statements by English.

Further, it appears that the Gillogly dealership assisted General in obtaining a fleet discount for cars in the year 1968 from General Motors.

Further, when the plaintiffs' witnesses were confronted with these facts, the principal of General, a man by the name of Dale Strimple, attempted to explain his obtaining cars from the Gillogly dealership by two circumstances: one, he claims that Gillogly must have been influenced by complaints which Strimple and Nabcor were making to the Justice Department; and, further, that if this explanation was not accepted he claimed that the sales by the Gillogly dealership in 1968 were explained by a ruse Strimple was performing by dealing in the name of a leasing company named Econo-Car.

The stories about Econo-Car and the pressure from the alleged complaints to Justice were simply ludicrous. The record demonstrates that they are worthy of being rejected entirely.

I will simply say at this time in order

to get on with the jury trial that every single allegation or piece of testimony about threats by General Motors against Nabcor and the statements that General Motors' personnel about allegedly threatening dealers who sold to Nabcor or calling Nabcor a bootlegger or saying Nabcor shouldn't buy cars, all of those statements have been disproved, at least on the present record, by evidence so far superior in credibility to the plaintiffs' testimony as to be conclusive in my mind.

I shall only add this note: Despite the plaintiffs' continual talk about Nabcor being shut off from sources of General Motors' cars, being shut off because of a lack of fleet certificate, being shut off for any other reason, the record shows that prior to December 13, 1967, Nabcor obtained 96 new General Motors cars. This is before December 13, 1967. I mention this date because it is about this time that the visit of Maiorana to Belcher occurred and certain other alleged pivotal events occurred.

Moreover, after December 13, 1967, Nabcor obtained more than 240 automobiles from General Motors dealers.

Consequently, I am ruling that the plaintiffs will not be permitted to introduce against

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General Motors any hearsay declarations of alleged co-conspirators. I wish to make it clear that my ruling at the present time relates solely to this question of admissibility of evidence. It is based solely on the record at the preliminary hearing, and although I have made certain findings of fact for the purpose of this preliminary hearing in my evidentiary ruling, I wish to make it clear that my statements are solely in the context of the evidence proper.

I am not making findings of fact on the ultimate merits, and although this may seem incongruous from a legal and procedural standpoint, it is clear that as of now the plaintiffs are entitled to present their case to the jury and present their case on the basis of properly admissible evidence according to the rulings I have made and according to future rulings which will be appropriate ad questions arise.

The main point that I think should be emphasized is this: in my view it would be a travesty to prmit Frank Maiorana and other witnesses connected with the plaintiffs to get on the stand and simply parade before the jury a lot of statements by out-of-court people which people are supposed to have heard General Motors say this and that, and have seen

General Motors do this and that. If the plaintiffs wish to bring in people with knowledge of the events and direct knowledge of General Motors' statements and actions, that is another story.

Let's go with the jury.

MR. PERSON: One thing, your Honor: two of my plaintiffs, Courtesy Order Brokers and Robert Heim, wish to dismiss the complaint with prejudice and without costs.

THE COURT: The motion is granted.

The plaintiffs that I will be introducing to the jury are Natural Order Brokers --

MR. KAPLAN: We have prepared a proposed voir dire and it does contain all the material. It has been served on Mr. Person. It is one of the tabs. There are three tabs and I believe a list of the parties is in one of them.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: On the record.

MR. PERSON: For the record, your Honor, before we go into trial, I would like to renew the objection that I had and I ask for an adjournment to be able to give Alfred Julian time to prepare to enter the case.

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PORTIONS OF THE TRIAL TRANSCRIPT FROM 10/20/76 to 12/6/76, INCLUDING AFFIDAVIT OF PREJUDICE rp3

is of relevance and only to the extent that the concept illumes and explains the facts is the concept relevant.

I will not permit because it is irrelevant and prejudicial, and let me put it this way, there is no showing that Mr. Maiorana is competent to testify about the general problems of the automobile industry in general. I will not permit Mr. Maiorana to launch into a discussion of his opinions about the automobile industry in general.

I am ruling that it is irrelevant and I am ruling that it is inevitably prejudicial to the defense, and I further believe that if we start on this path we will be consuming time and distracting the attention of the jury from what are really the issues. The issues are the credibility of Mr. Maiorana and his other witnesses in respect to the particular transactions, many of which were the subject of the preliminary hearing, and I will not permit the jury to be distracted by a whole range of other things which are not relevant.

Now, I go back to the question of the concept. I have two problems there. First, I think Mr. Maiorana has the tendency, I think he is simply eager beyond words to say what he wants to say in this court. I don't blame the cars were not furnished.

I have been turning over in my mind how to handle this before the jury. We have to be perhaps more careful than we were at the preliminary hearing.

I'm going to say this. I think your witnesses have to be extremely careful on this. Naturally, if you brought in a dealer to state that "General Motors told me I could not sell to you," or to state I didn't deliver because of something that was admissible, the dealer could testify to what the dealer could testify to. I'm not trying to say what that would be.

From Mr. Maiorana's standpoint or from Mr. Strimple's standpoint or from the standpoint of these other Nabcor people, I will not permit them to testify as to the reasons why the dealer didn't deliver. I will not permit them to testify as to statements made which could be used against General Motors and which would be improper under my ruling.

On the other hand, you are clearly entitled to introduce as circumstantial evidence instances of failures to obtain cars. The explanation of those failures are another matter. But the failure to receive cars in and of themselves are circumstantial evidence on the issues here. How it cuts, I don't know.

I want this clearly understood. I am sure it's a very important part of your proof, and it is a legitimate part of your proof, to prove instances where there was inability to obtain the car. Therefore, Mr. Maiorana or Mr. Strimple, whoever it was that was doing the dealing, can certainly testify that "We ordered ten Pontiacs over a period of three months. They were to be delivered within the next six months. We attempted to get those Pontiacs. We called them; we were ready to pay for them; we did not receive them."

I'm not trying to predict the exact form. There may be other things that may be admissible, Mr. Person, but certainly that kind of testimony basically as to what went on behind the scenes at the dealer, what the dealer said, if it gets into reasons and so forth, that has to come from the dealer or from some other witness. You keep that in mind.

I do want to bring in the jury.

MR. PERSON: I think a typical case -- I tried to see how the answer could be given deleting any hearsay, and I think that an appropriate way would be to elminate the hearsay and say that the dealer said, "I can't sell to you because you don't have a fleet certificate." That doesn't say that GM told him to do that.

THE COURT: I will not try to sit here and predict. When that comes --

MR. PERSON: It will.

THE COURT: Give me a little warning.

MR. PERSON: It will come up, maybe even today.

THE COURT: I owuld like to see the setting of it. I don't want to rule now. This is a crucial thing. This is what we had nine days of hearing about. I don't want to have it thrown away in an inadvertence.

I don't want to predict -- it may come in a circumstance that it is admissible; it may not. I want you to warn me a little in advance because then I will have the context.

MR. F. MAIORANA: Your Honor, the

THE COURT: Mr. Maiorana, the question was simply where did you order the cars, and I think that answer is from the franchised dealers of the Ford or the other manufacturer, is that the answer?

THE WITNESS: Yes. Under the fleet program.

Q Did Nabcor recommend any selling practices to the Nabcor brokers?

A Yes.

Q Could you please describe what the selling practices were?

A Well, throughout the period, the beginning, we gave them 16 weeks of training, actualy personalized training.

Later we reduced that to manual. However, no training program existed for this type of thing and we used automobile --

THE COURT: I didn't hear you. You said it was reduced to what?

THE WITNESS: A manual, training manual.

Q What practices were there for selling new cars to the retail public that you suggested to the brokers?

A We suggested in order to keep the expenses in line, with keeping the expenses at an absolute minimum, and in order to offer the car at a low price, and this was the reason for keeping the expenses down, that we had what -- the automobile industry had it years before, and that is where I learned it, the five, ten, fifteen and twenty system established --

MR. KLEINBARD: Would the witness keep his voice up?

THE COURT: You have to keep slower and louder and take your time.

3 A What it was is that we suggested a solicitation program to the brokers, that they make five personal contacts per day, ten telephone calls, since we were handling all makes and models of new cars, each and every household at that time had at least one or a second car.

And since our brokers were handling all makes and all models, each call that they made was a prospect, a potential buyer of an automobile.

So that was ten telephone calls and we suggested fifteen mailings where we gave them printed forms they could mail out to the general public.

Mail out fifteen letters per day and twenty indirect contacts that they would go to their local garages that might have a certain amount of customers and ask them if someone wanted to purchase an automobile, to call them, and maybe the baker or indirect contacts

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of that type.

Just to set up various people who came in contact with the general public and maybe give them some gratuity, some money or a gift for a lead.

THE COURT: Can we shorten this a little bit? This is still background.

THE WITNESS: I am through on this point except for the fact that it constituted fifty contacts per day.

THE COURT: This is something you can bring out by leading, Mr. Person.

MR. PERSON: Okay, fine.

Q About how many persons in an area were supposed to be serviced by a typical Nabcor broker at the earliest part of the history of Nabcor?

A The concept was always that for each 10,000 population we would establish one broker.

Q Did you have a reason for establishing it at that number?

A My experience was that in towns of 10,000 you usually had every make represented as far as dealers were concerned. So we would put one broker in a town of that size, one broker per 10,000 population, dealing in all makes and all models.

Q Was this broker supposed to act alone or was he supposed to act with other people that he might hire?

A He acted alone.

Q Was he similar to any type of person in the franchized dealership that you could identify?

A He would be the equivalent of a salesman in a franchised dealership.

THE COURT: He would not normally

have employees? He would be doing this business himself?

THE WITNESS: That's right.

Q Was it anticipated that he would be doing this in connection with other businesses or not?

A No. This would be a full-time program for him.

Q Did you have any idea of whether this could be profitable for a broker?

A Yes.

Q Could you explain how you concluded that?

A Well, the broker would make $100 or 50 per cent of a $200 brokerage fee. That was added to the dealer's cost of the car.

Q Maybe we better back up and ask how you purchased the car from a dealer. What terms did you have typically when you bought a car as Nabcor from a franchized dealer?

MR. WEISBERG: May I object to the question since he's going to describe how Nabcor purchased cars.

THE COURT: He's trying to get this witness' testimony about the economics and he could ask, "Was there a typical price paid?"

Q Could you explain what kind of deal it was with the franchised dealer so we could see what you are adding the $200 fee on to?

MR. WEISBERG: Objection.

THE COURT: Overruled.

A For Chevrolets, Pontiacs, cars like that, in most cases it was $25 over the dealer cost. It went up to $75 over dealer cost, except for Cadillacs and Mark IVs.

THE COURT: $25 over dealer cost?

THE WITNESS: Yes.

THE COURT: And you say at some point that went up to 75?

THE WITNESS: No. Some cars. In other words, within --

THE COURT: I get it.

Q Dealer's cost means the price that the dealer paid General Motors?

A That was what the dealer paid to General Motors or Ford or whoever.

Q Are you familiar with a concept called a hold-back?

A Yes.

Q Tell me what that is.

A The original manufacturers held back 1 per cent of the invoice of the car, the cost of the car. They held this in reserve until the end of the year, and at this time they gave it back to the dealer.

Q Be more specific.

A They held back 1 per cent of the cost of the car so if the car cost $3000, the manufacturer held $30 of that. Subsequently it was raised to 2 per cent.

Q Would that require that the manufacturer add $30 on to the price that he sold the car to the dealer for?

MR. WEISBERG: Objection, your Honor. I don't think there is any foundation as to what the manufacturer did with its pricing based on this hold-back.

THE COURT: I don't know why we have to get into the 1 per cent hold-back.

MR. PERSON: The pricing often took the hold-back into account.

THE COURT: Can't we simplify it now and get forward?

Q Nabcor bought from the dealer at the dealer's price he paid to the manufacturer plus an additional sum that represented the get-ready, is that correct?

A Yes, and in some cases it was $75 over, less 1 per cent. That's why I started with the 1 per cent, because when it went to 2 per cent then the fleet buyers, in their negotiations with the dealers, removed the additional 1 per cent from the get-ready charge.

Q Let's eliminate the hold-back. Let's deal with a simple transaction, that when the dealer you delt with brought the car from the factory and paid to the factory $3000, could you describe what amounts, if any, Nabcor paid to that dealer in excess of $3000?

A To simplify it, on a Chevrolet, let's say, we would get the car for $25 over that $3000, or we would buy it for $3025. That was his cost of get-ready and he kept the 2 per cent.

Q What do you mean by "get-ready"?

A The car came in from the manufacturer, and the dealer would check out certain things, tune up the car, inspect it, wash it, and make it ready for delivery.

Q That service was included in the $25 amount the dealer tacked on to the price he paid the factory?

A Yes.

Q And Nabcor then paid $3025?

A Yes.

Q You testified that the Nabcor system added $200 on to that --

THE COURT: I'm trying to prevent getting into the hold-back. Let me ask you this:

Is there a concept called "get-ready"? Is that a term used in the industry?

THE WITNESS: Yes.

THE COURT: What does that mean again?

THE WITNESS: It means when the car comes in from the manufacturer most states -- I think New York has an inspection requirement --

THE COURT: Is there something that has to be done to get the car ready for delivery, certain physical things?

THE WITNESS: Yes.

THE COURT: And it costs the dealer a certain amount of money to do that?

THE WITNESS: Yes.

THE COURT: You have said that $25 was viewed as the get-ready charge.

THE WITNESS: Yes.

THE COURT: Your understanding was that this was the equivalent to the dealer of getting it ready, approximately?

THE WITNESS: It could cost him less, your Honor. It's according to what type of volume he did.

THE COURT: Roughly speaking, was it your idea this was the get-ready cost?

THE WITNESS: Yes. On some bigger cars it would be more.

THE COURT: That's why you would pay up to $75?

THE WITNESS: Yes.

THE COURT: Did you tell me and tell the jury that the dealer then in those instances would be able to keep this amount that was held back; at the end of the year there was an amount of money that was credited or paid to the dealer, right?

THE WITNESS: Yes, 2 per cent.

THE COURT: Let's get into that as long as we are talking about compensation.

To your understanding would the dealer give General Motors initially $3000 if it was a $3000 Chevrolet?

THE WITNESS: Yes.

THE COURT: And then at the end of the year there would be the 1 per cent or the 2 per cent credit or payment back to the dealer?

THE WITNESS: Yes. Two per cent.

THE COURT: I think you said it changed.

THE WITNESS: It had been 1 and then changed to 2.

THE COURT: If it was 1 per cent that would have been $30, and if 2 per cent, $60?

THE WITNESS: Right.

THE COURT: Under the arrangements the dealer would keep that?

THE WITNESS: Yes, he would keep that.

THE COURT: You viewed that as his compensation, his profit, in selling to you, right?

THE WITNESS: Yes.

THE COURT: Because the $25, the $75, was really cost to him basically?

THE WITNESS: Basically, yes. He might make a few dollars, but basically it was cost, and all during the period from '66 on that I was in the Nabcor business it was 2 per cent.

THE COURT: I understand.

BY MR. PERSON:

Q On to this $3025 amount what did Nabcor add? What was the total amount that the customer would pay to the Nabcor system?

A $200 was the brokerage fee. At a later point we added $25 for handling and registration because we registered the cars; but initially the actual brokerage fee was $200, of which --

Q Who would receive that fee and in what amount?

A The broker, the level broker we were talking about, which would have been the equivalent of a salesman, kept 50 per cent of the brokerage fee or he made $100 for selling the car.

Q And Nabcor received the rest, I gather?

A Nabcor received the rest.

As we went -- in the initial stages it was not that way. It was really -- we only made $50 on a car at all times. There was someone in between. There was an area broker, who was sort of a manager, he made $50 and we made $50.

Q Are you referring to the franchise system of Nabcor which developed after?

A Yes.

Q Could you state approximately when this change in franchising occurred?

A It occurred in mid-1967.

Q Could you state why you changed the Nabcor system, just generally?

A We started by imitating the manufacturers by having our own offices or zones. We had an office that was serving the brokers in the Philadelphia area, which was in Jenkintown, which was the main office of the company. Our office in Yonkers was serving the New York area. In fact, we had established an office in Washington, but the problems that were created for us or that we ran into, as a result of some of the activities of the --

MR. KLEINBARD: I move to strike that.

THE COURT: Let's not try to argue the case here.

THE WITNESS: I'm sorry, your Honor.

A (Continuing) We found that it would be better -- I just had to free myself from the actual operations in New York, because I was primarily in New York most of the time at that time, so I decided to turn our system into a master system out of our offices and prepare a master broker who would in turn handle the brokers themselves, and I created a master broker, broker system, and consequently a master broker, area broker, broker system.

Q That's a little difficult to digest.

You are saying in order to control the brokers you interposed a franchisee called the master broker in between Nabcor and the brokers?

A Yes.

Q And you called that a master broker?

A Yes.

Q You called the franchisee at the bottom a broker?

A Yes.

Q The same name you had used originally for the original brokers?

A Yes.

Q Did you interpose another franchisee somewhere in that system?

A Yes.

Q What was the name of that new --

A An area broker.

Q Where did you put the area broker in your system?

A Between the broker and the master broker. His function was to appoint ten brokers in an area of 100,000.

Q By "appoint," you mean to sell a franchise for ten brokers?

A Yes.

Q Would that area broker be responsible to a master broker?

A Yes.

Q How many area brokers would be responsible to a master broker under the new franchise system?

A Ten.

Q There were how many brokers responsible to the area broker?

A Ten.

Q That would mean there would be 100 brokers at the bottom, ten area brokers, with a master broker sitting at the top?

A Yes.

Q How many master brokers did you envision appointing?

MR. KLEINBARD: I object to "envision."

Q Did you have a plan --

A Two hundred. One master broker for one million population.

THE COURT: How many?

THE WITNESS: Two hundred master brokers.

Q Did the fee structure of Nabcor change from the $200 or $225 that you referred to earlier?

A The fee never changed.

Q Could you tell me how the $200 or $225 was then allocated among Nabcor and its three categories of franchisees?

A The $25 was a handling charge for the cars.

Q Are you saying, if I can go back, that

Nabcor got the extra 25?

A Yes, for the registration handling, which we took care of.

Q Who got the $200?

A The R200 brokerage fee, the broker got $100 -- that never deviated -- the area broker got $50 and the master broker got $25 of what Nabcor's $50 profit would have been.

Q Under the old 200 system?

A Yes.

Q Did Nabcor get the remaining 25?

A Yes.

Q Together with the other 25 which was a service fee Nabcor got $50?

A Yes.

THE COURT: Let's take a short recess.

(Recess.)

(In open court; jury present.)

BY MR. PERSON:

Q Were the Nabcor brokers instructed to favor any particular manufacturer when it came to recommending cars to prospective customers?

A No. They were to recommend an automobile only on the basis -- and this was part of our training -- only on the basis of what they felt was the best car suited to that particular individual; in other words, what was the best automobile based on the customer's income, what he would need it for. They were supposed to provide a consultation service in addition to a purchasing service. That was the general idea.

Q Did the dollar amount received by the broker vary according to the advice he gave?

A Not one iota. He made the same on any automobile.

THE COURT: We can save time. I think we get the point without repetition and all.

Be as concise as you can.

Q Did any customers of the brokers have a used car to take care of? Did they have a used car that had to be disposed of in connection --

THE COURT: You mean a trade-in?

MR. PERSON: Yes.

A During the time that the car was in the process of being manufactured, while it was

Q Gross profit per car?

A Yes.

Q Did you make any estimate of what a broker could be able to sell in his area?

MR. KLEINBARD: Excuse me, I object to that. There is no foundation laid.

THE COURT: Yes, I think we are getting into speculation. I think it is irrelevant and I sustain the objection.

Q Did Narcor have any employees?

A Yes.

Q Could you state how many employees Narcor had, say approximately the middle of 1966?

A I would say we had forty or fifty employees between New York and Philadelphia.

We had franchise men, training managers, we had four representatives that went to the brokers' offices on a daily basis, not visiting, you know, every one of them each day, but during the month to visit them at least once or twice a month, and find out if they have any problems on site they could help them with.

So we had four employees that did just that. We had training men holding training meetings.

THE COURT: You don't have to describe that.

You had franchised men as well?

THE WITNESS: Yes.

Q Were they selling franchises?

A Yes.

Q About how many people at one time were engaged in the business of selling franchises during the middle of 1966?

A I would say 15 or 20, 25.

Q There would be other people, a number between 15 and 20 more?

A More than that, I believe.

Q About how many were not engaged in selling franchises?

THE COURT: If you subtract, you have somewhere between 2 5and 35.

Q You are including yourself, Mr. Maiorana, among that?

A Wait a minute. I lost us now. 25 or 35?

Q I was trying to eliminate the franchise sales people from the number of people employed by Nabcor.

How many people were in the car business away from franchising?

A I would say about 25 or so.

Q Did that number change?

A Yes. At the beginning of 1967 I had to cut back drastically on employees because --

THE COURT: Look, just what happened? You cut back to what?

THE WITNESS: Back to maybe five or six, seven people.

THE COURT: To five to seven people?

THE WITNESS: Yes, including ourselves.

Q Did that number increase at all substantially during the remainder of Nabcor's history?

A Not substantially, no.

Q You were a principal in All Crest Auto Leasing located in Pennsylvania. Whereabouts was that located?

A That was in Norristown, just outside of Norristown.

THE COURT: Norris with an N?

THE WITNESS: Yes.

Q What period of time was All Crest engaged in business, what years?

A From the end of 1960, I think, to 1964.

Q Do you know if All Crest had a fleet certificate issued by General Motors?

A Yes, it did.

MR. PERSON: I have a document marked for identification as 447.

THE COURT: Are you offering it?

MR. PERSON: Yes. It is Defendants' Exhibit GG. I offer it in evidence.

MR. KLEINBARD: No objection.

THE COURT: Received.

xx (Defendants' Exhibit GG for identification received in evidence.)

MR. KAPLAN: This came in previously.

MR. PERSON: We are using the same numbers and letters.

THE COURT: I wish we would use the same documents. I just think we will have a lot of documents.

MR. KAPLAN: I am sorry, your Honor. I was under the impression that you had them. I am told we have them.

THE COURT: Let's use the same document exactly. Thank you a lot.

Q Will you please take a look at this exhibit?

THE COURT: What is the question?

Q Is this a copy of the fleet certificate that

MR. PERSON: Colonial wanted the orders and they were happy with them.

MR. KLEINBARD: Whether they were happy or not --

THE COURT: The trouble is that this is really a dilemma. We might as well explore it.

The ultimate inference that I assume you want drawn is that here was Mr. Murray, who initially said "I am willing to sell to you," and later he says or does something different.

Now, that of course is sought to be really introduced as proof of conspiracy by General Motors.

MR. PERSON: Not an admission.

THE COURT: But it is circumstantial evidence, so there is that problem, and he is saying what Mr. Murray said to him to prove something.

Now, on the other hand, there has to be a way for him to testify about what he did in a natural way, and I am not sure that Mr. Person is relegated to the bare bones of just saying he sought to place orders, "I placed seven orders and I received three, and I didn't receive the others."

MR. KLEINBARD: I don't mean to interrupt, but why isn't that sufficient for this particular purpose?

MR. WEISBERG: If he wants to know why that Cadillac dealer didn't live up to it, he can bring in the dealer.

MR. KLEINBARD: The fact of the order I don't object to. I don't object to the fact that the orders were not received, but I think that is what he is limited to, and that is what we went through.

MR. PERSON: These aren't statements by a co-conspirator. These weren't things used --

THE COURT: How is it going to end up?

MR. PERSON: That Mr. Murray was very happy to receive the orders and he knew Nabcor was reselling cars and sent a letter to them.

THE COURT: I think it is a fine line, but I am not sure -- he participated in this and these are attempts to get cars and he was attempting, he says, whether true or not, "This is what I did." Part of what he did is he talked to people and it wasn't a one-sided conversation.

He told him something and there is background for him doing things. It seems to me entirely artificial, and I don't know the pure logic of it, but I think that it comes in, in my view, as simply testimony about what he did, if this is what happened.

When it comes to saying or giving conclusions, he was refused or maybe we will have to draw some artifical line. When it comes to the refusal maybe I will let him tell the first part and not the last part if the last part gets into statements that are allegedly hearsay statements by General Motors or innuendo, I may cut it at that point, I don't know.

But I think that -- I don't know how he is going to testify.

MR. KLEINBARD: May I ask this question, your Honor. If he places, as he did, 30 or so orders and there was a substantial number of orders placed, nobody places a substantial number of orders unless there is the impression that the other end of the conversation is going to receive them.

MR. PERSON: That is part of the transaction.

THE COURT: I don't think that the preliminary hearing cut out every single conversation that ever went along and I think it is kind of -- maybe I have to cut a lot of that, just hearsay stuff about General Motors telling me that he couldn't sell.

MR. KLEINBARD: He said that they were happy to sell them.

THE COURT: If it is his testimony he was happy -- what is he going to say?

MR. KLEINBARD: Heplaced those orders and obviously --

THE COURT: I don't know. Mr. Person, I am going to take it one step at a time. There are some hard lines drawn, but my basic feeling is he has to be able to testify about transactions, what he did.

I am trying,however, and will continue to try, to keep up what I will call the hearsay statements of alleged co-conspirators, where I feel that it would involve the co-conspirator testifying about what General Motors people said or even where there might be some pretty strong implication of what they said.

I don't know if that is a good line, but I just have to cut it some place, and it may not be completely logical.

But I will permit him to testify to what you asked him so long as it is not in terms of what somebody told me, not in conclusory terms.

MR. PERSON: I don't know exactly, we have no line set up, your Honor.

(In open court.)

THE COURT: Ladies and gentlemen, I won't try to go into the evidence problem in detail, but what we are trying to deal with, and I think you noted the objections, and maybe I shouldn't try to describe this in detail.

But it is a problem of hearsay evidence and under some circumstances if a witness says that X told me something,if it is introduced to prove that something happened, X told me; and the witness is on the stand and says X told me that his car run through a red light, if the attempt is to prove that the car ran through the red light, you have the witness who never saw it and he is trying to describe a statement of X, and X isn't in court, and you can't observe X and X can't be cross-examined, and there is a hearsay problem.

On the other hand, we are struggling a little bit with hard things that apply here. Mr. Maiorana has to be able to tell you the basic nature of his transactions and yet, if he says that Mr. Murray said that he was happy to sell cars, that may be an issue in the case, whether Mr. Murray was happy to sell the cars, and so it isn't a very good way to prove whether Mr. Murray was happy to sell or not happy to sell cars, because Mr. Murray isn't before you.

You can't observe Mr. Murray and right now

Mr. Murray isn't available for them to cross-examine. Yet, I think I am going to do it this way, trust to your common sense, there is a question in this case I imagine as to whether Mr. Murray was or was not happy to sell cars and what Mr. Murray did and why later on.

That really isn't being proved one way or the other by Mr. Maiorana's statement as to what Mr. Murray said.

What I am trying to do is to ask you, as far as this whole question is concerned, the question of the background and reasons for what dealers did in selling or not selling to Nabcor, whether it was an independent decision as to the price they wanted for a car or a decision as to whether Nabcor was creditworthy or reliable, or whether it was motivated by a conspiratorial activity on the part of General Motors; those are the basic issues in the case. The reason why these dealers did or did not sell to Nabcor is probably one of the crucial issues in the case. I have to ask you to somehow in your mind -- and I will try to protect you from hearsay testimony in that to the extent we can -- realize that when Mr. Maiorana says that Murray says, that does not prove it, but Mr. Maiorana has to be able to tell you about his transactions and he can't do it by telling half of a conversation.

If he entered into dealings with Colonial Cadillac and placed orders, the orders took place in the frame they did some talking. It didn't happen in thin air or with half a conversation. In order to permit Mr. Maiorana to testify naturally and normally, I will permit him to tell these conversations to some extent and I am going to ask you to keep a very careful note that you are hearing this testimony as to his side of the transaction. But when we get to the question of why the dealers did such-and-such, it will have to be proved in some way other than the hearsay way. That's the best I can do. I hope it won't be too difficult as time goes on.

You may proceed. We will adjourn in a minute but continue.

BY MR. PERSON:

Q Do you recall when you talked with Mr. Murray?

A My recollection is probably March or April or 1966.

MR. PERSON: I have an exhibit here, No. 18.

THE COURT: This type of thing will become clearer as time goes on when you see the different kinds of proof, and certainly the lawyers in their summations will be engaged in telling you the different proof on different

NATIONAL AUTO BROKERS CORP., et al.

vs.

GENERAL MOTORS CORPORATION, et al.,

New York, October 26, 1976,

10:10 a.m.

Trial resumed.

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(In the robing room.)

THE COURT: We are a little late with the jury already. I have gotten your memorandum about this Colonial Cadillac thing which I have glanced at now. I don't really understand why there is any new thing to discuss beyond what we discussed last Thursday. We can't keep going over and over the same points.

MR. KLEINBARD: I recognize that, your Honor, but I think during the weekend we did considerable reflection about this and what we are concerned about is not only what has taken place but the fact that we had 30 refusals to deal, according to Mr. Person's opening, and it's been emphasized over and over again. If we allow this evidence of hearsay, irrelevant and prejudicial, to keep coming in, we will undo all I thought we had

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accomplished at the preliminary hearing. There is no evidence un any of these conversations directly connecting my client. The result is that the jury is called upon to make an inference. It makes an inference on the basis of evidence which I respectfully submit has no probative value.

THE COURT: If it has no probative value the case will never get to the jury.

I went into this as much as I could Thursday. I could be right, I could be wrong, but I assume that there is going to be a certain amount of evidence about things of this kind; namely, Mr. Maiorana is going to get on the stand and testify that he approached this or that auto dealer, they agreed to sell him cars, it turned out they didn't.

That will be in his view, and it may turn out to be a valid view or invalid view, I don't know, that that is circumstantial evidence that this was something more than just independent action of each individual dealer.

On the other hand, the question of the actual explanation of the refusals to deal, if you want to put it that way, I don't think he's going to get this in by hearsay.

MR. KLEINBARD: I understand that, your Honor.

THE COURT: That's the crucial thing. It is not undoing all we did. I think that to my mind, although there may be some inconsistencies in pure logic, when it comes to the proposal that Mr. Maiorana testified that Mr. Rogers, or whoever said it of Colonial Cadillac, said, "I wont' sell these cars to you because General Motors told me not to," or any other explanation, I think that that is the crucial evidence here, and that cannot come in through hearsay.

Although it may be an artificial cut-off, I'll make that cutoff and that's the way I'll handle it. If he can't prove any of these transactions we might as well go home.

MR. KLEINBARD: The problem really is, your Honor, which one of us, at this late date, has the burden of proof of bringing forward the various dealers in order to testify to the other end of the transaction. He can testify and I have no objection to the fact that he placed orders.

On the questions of the refusals, as I have indicated at page 5, which I am sure you glanced at, there are so many reasons as to why the cars might not have been sold that it supports no particular inference. Yet I run the risk, with 30 such episodes repeated in the record, not only of an enormously prolonged trial but also I can't take the chance, it seems to me, that the jury may not spell something out of this that they should not.

THE COURT: I am under the impression there are a limited number of dealers that are going to be referred to in a kind of narrative way. You referred to a few in your opening statement -- Colonial Cadillac.

MR. KLEINBARD: He stated 30 in his opening. That's what had me concerned over the weekend. If we are going to have 30 such people referred to, plus orders placed --

THE COURT: How many of these situations are you going to have Mr. Maiorana and other witnesses describe?

MR. PERSON: The ones that are in the brief, and I had not counted them, except those that are after December 10th --

MR. KAPLAN: There are 45 of those, your Honor.

THE COURT: In other words, are you going to have witnesses testify as to this kind of narratuve: that so-and-so from Nabcor was in touch or had discussions with a particular automobile dealer, Gillogly or whoever, and then describe a course of transactions, whatever it would be?

So far we have heard of a limited numbef of those things and I'm not referring back to the pretrial memorandum; I am talking about a preliminary hearing in your opening statement.

It has not seemed to me unmanageable the way you presented a finite number of instances in your preliminary hearing. You referred to a finite number of instances in the opening statement, although you generalized to some extent. What I am asking you: how many instances are there where you will go into some degree of detail about transactions with a dealer?

MR. PERSON: Mr. Kaplan has mentioned 45 and I would assume that is probably near correct. These are not very detailed. I am willing to show they were dealing with a group of dealers and one by one they stopped dealing with us.

THE COURT: I think he has to be able to present his case. That's his case.

MR. KAPLAN: Your Honor, there are some instances, for example, Hamister-Gillogly Chevrolet, where the plaintiffs say they went in and started to do business with the dealer or talked to him or whatever, and then something happened which, if their evidence is admissible and believed, could conceivably show that whatever happened with Gillogly Chevrolet had something to do with General Motors.

That's not the case for the vast number of these 45 dealers. In the vast number of these circumstances we have testimony such as we have on Thursday, that is, that Mr. Maiorana went in and had a conversation or ordered or didn't order a car and that was that. No evidence in the preliminary hearing or in the brief or by proffer --

THE COURT: I don't think we got through

Colonial Cadillac on Thursday. We are in the middle. How can we say what is going to come out?

MR. KAPLAN: He has written a 400-page pretrial brief which spelled that out. What I'm suggesting is that before we go on to any of these 40-odd dealer episodes there ought to be an evidence offer of proof to show what evidence there could be that could possibly bring it home to General Motors on any state of the record.

In most of them there is not, at least according to his brief.

MR. PERSON: We have a prima facie case showing that General Motors was participating in a conspiracy. We have in addition a variety of GM dealers that were doing business with Nabcor and then stopped doing business with Nabcor, and there is an inference which can be drawn based upon the prima facie case and these inferences that should go to the jury.

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MR. KLEINBARD: Of course, your Honor, the whole thing would be much simplified if we did this in somewhat different order. If Mr. Person would go to his case against General Motors and at least demonstrate that, then it becomes much simpler to make rulings on these other peripheral situations; but what we have here, at least what I am concerned about, is a build-up of peripheral situations, and by the time he gets to General Motors this is going to be too late, in my mind, in view of the potential prejudice.

MR. PERSON: It forms the background for Mr. Frank Maiorana's discussions with Mr. Belcher and Mr. Karney that most of these instances occurred before the December, 1967, and January, 1968, meetings, and there is reference to these problems at those meetings.

MR. KAPLAN: Whatever he said at the meetings he is going to testify to, obviously.

MR. PERSON: This is relative to have him testify that what he said, the truth of what he said, at the meeting is relevant and it is based upon these incidents that occurred before the meeting.

MR. KLEINBARD: Then he is building up his truth through pure hearsay, it seems to me. What he said to Mr. Belcher, obviously he said to him, and nbody is objecting to that. We have already heard that. If he seeks to extend it, we will do the appropriate things under the circumstances. But he didn't mention 30 or 40 dealers to Mr. Belcher. There is no evidence to that effect. He mentioned limited situations. Even according to him, even taking his testimony at face value, and not questioning it, as I say, herewe are going to have a parade of refusals altogether which proves nothing or perhaps they start and stop, and there are so many potential explanations for this conduct that to infer from that or to permit the jury to infer from that that we had anything to do with it, is a matter of substantial prejudice to us. That's the reason for the citation of the case I gave you.

Your Honor, I know this is a difficult problem. I don't know how else to handle it.

THE COURT: I have got to say this: Everytime we have gone into depth on any particular episode the testimony of the witnesses by the plaintiffs has been proved to be just absolutely untrustworthy to a remarkable degree. I have sat in this court for a little over four years, or whatever the time is, and I really have seldom seen witnesses who are so lacking in credibility. We started with Colonial Cadillac. We started with the representations Frank Mairona made to me in chambers in order to get a hearing, and this man either has a very fertile imagination or he is a very dishonest individual, and, as far as I am concerned, that is a fact of life here. We have a very unusual situation where there is a great opportunity for abuse of the processes of the court unless something is done.

I really did not think that this trial would shape up to a narrative of 35 or 40 of these instances where Mr. Maiorana glibly says that somebody promised him cars and then they were not furnished. I never read that pretrial memorandum thoroughly. It was so filled with things that were not helpful to our present point. I read some of it, and it was very useful. It was like laying out your proposed proof, but I don't have it in mind.

The things I have in mind at the moment are the things that have occurred in our preliminary hearing and during the short time the trial has been going on.

The trial simply has to shape up. It is just not right to have a long, long parade of instances which are described in some bare terms and then placing the burden on General Motors to walk back with the explanations which, so far, they have done in every case.

If I were on the jury it would be devastating to have these explanations come in, devastating to the plaintiffs' case. I guess one piece of strategy for the defense side would be to let Maiorana string himself out, you know, go out on the longest, thinnest, limb they can find, and then simply cut him off. So far they have succeeded in doing that. That's not just an inflamed term; that's, in fact, what has happened.

I think that the buden ofproof is on you, and the trial has to get organized. I do not know what the cutoff point will be, but I think that the starting point has to be, really, in terms of your opening statement which I very much appreciated; it was very lucid and it seemed to me to follow along pretty well.

You gave a narrative in your opening statement. At some point you started talking about specific dealers. You mentioned the instance of the dealings with Walter Gray of the Pontiac zone.

Then you mentioned Luby and Allen Chevrolet. You said that Luby refused to deliver cars in October of 1966. The cars were sent to Allen, and you talked about Nabcor ordering the 10 cars from Allen, which turned into Mid-Town, and that led to that incident.

Then there were the talks with Englert and Englert's superior as alleged.

Then, as you said, beginning in 1967, the focus shifted to Buffalo. Then you talked about Bolling and the Strimple situation. As you described the focus having shifted to Buffalo, you, of course, summarized the situation there leading up to the English incident at Gillogly Chevrolet.

Then you said -- and these were your words -- "Buffalo collapsed as a possibility for General," and General turned to Nabcor and Nabcor turned to Rohrer Chevrolet in Camden. That led to two or three cars being obtained in late 1967, and there were other cars on order from Rohrer.

You discussed some transactions relating to the attempt to get a fleet rebate or fleet

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certificate. I guess that was a fleet rebate. You discussed getting this through Rohrer in the Chevrolet zone in Philadelphia. That led to an unannounced visit, according to your statement, of Speece and Di Simone to Anthony Maiorana in the middle of December. That led to the visit to Belcher.

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Now, you said in your opening statement that by the time Frank Maiorana went to see Belcher Nabcor had been refused a deal from 30 dealers.

What I am going to ask you to do, Mr. Person, is this: at least at the outset, I am going to ask you to follow the narrative you had in your opening statement. It made sense to me hearing it, I think it will make sense to the defendants in trying to organize their defense and I think it will make sense to the jury. When I say it makes sense, I am not, obviously, vouching for the merits of the claims, but I am simply talking about the clarity of the presentation of the claims.

That narrative as you described it and as I think Frank and Anthony would testify about it is perfectly manageable and everything would be in hand. Now, I don't know at the moment how to handle the allegation of refusals to deal by 30 dealers, but I think we could pass that for the moment, and if you get your narrative in on the main points, then these other things might be able to be handled in some simply way we might be able to figure out at the time, or maybe your witnesses will testify as to 30 transactions. I don't know.

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But I am going to ask you at the outset to follow the outline you had in your opening statement and then if there is a need to scatter out into many, many transactions we will figure out a way to do it.

MR. PERSON: I have a problem and that is that I am expecting or I was hoping that the jury would hear the problems that Nabcor was having prior to the crucial meeting that there was.

THE COURT: With Belcher?

MR. PERSON: Yes.

THE COURT: Look, I am not precluding that. I am saying to you, and I guess it wasn't clear -- let me make one amendment. Go through, if you would --

MR. PERSON: Up to Belcher?

THE COURT: Up to Belcher, and then let's gather again and canvass the situation. You might feel differently at that point. It's hard to see, but maybe there is a way to simplify this.

I would also say for the moment to defer the Colonial Cadillac thing and simply tell the jury that we have talked about a way to try to simplify the proof here and I will explain, so there is no prejudice to you and no indication that you have dropped something, that all sides have agreed to cooperate to a plan to at least for the present attempt to simplify and make the trial more efficient and that for the moment that the Colonial Cadillac matter will be deferred until a later time, and then we will proceed with something else.

MR. KLEINBARD: Your Honor, the program you suggest is satisfactory to me, with just one modification. I believe the overwhelming bulk of these 30 or so dealers occur before Mr. Belcher. Now, whether he goes to Mr. Belcher on the basis of five instances or 20 instances, for the purpose of setting the tone of the case, it makes no difference, and we don't get into this problem that I have discussed.

THE COURT: Can't we cross that --

MR. KLEINBARD: Because if he sticks to the ones that he mentioned by name in the opening, then at least we have a finite area.

THE COURT: I don't want to try to cross all the bridges. I am going to ask Mr. Person to for now go through --and I think he has the idea perfectly clearly -- go up to the point just short of the talk with Belcher, and then follow the outline he gave in his opening statement, the dealers that I mentioned -- if there is any question about it we can go over it again, but I don't think there is -- and then at that time canvass our situation and see what would be appropriate, so that he gets a fair shake at putting on his evidence and yet it's in hand some way. It's always a matter of organizing it, that's all.

MR. WEISBERG: Your Honor, I have a personal problem. I represent Paragon Oldsmobile, who is mentioned on page 173 of the pretrial memorandum. I was wondering if some arrangements could be made where Mr. Person would let me know when testimony is going to go in against my client.

THE COURT: I will tell you what. The Paul, Weiss lawyers will be the liaison and you keep informed of the progress of the trial through them and of your needs. As far as I am concerned, you are excused for all the time that you feel you should be absent and you can come and go as you see fit. It's entirely up to you.

MR. PERSON: We might be able to put Paragon on at this time as one of the earliest transactions.

Q Do you recall approximately what time this occurred, what date?

A It was in the fall of 1966. It was in conjunction with the introduction of the 1967 model Pontiac.

Q Was there any kind of meeting taking place?

A Yes.

Q What type of meeting?

A It was a NAFA meeting, which is the National Automobile Fleet Administrators meeting.

Q You were in attendance at this meeting?

A Yes. I was invited by Earl Stewart to attend that meeting and there were factory officials there and other fleet buyers.

Q Were you introduced to these factory officials by any person from Ruckle Pontiac?

A Yes, Earl Stewart.

Q And that was at the meeting?

A Yes.

Q Did you have the occasion to talk to these GM officials at that time?

A Yes.

Q Could you state what you talked about, please?

A Well, they were very anxious to --

THE COURT: No, no.

MR. KLEINBARD: Can we have the conversation?

THE COURT: I think you must try to remember as well as you can what was said and by whom specifically. If you can't remember exactly you tell the substance and if you can't remember exactly who said wehat and there was a group you say that, make that clear to us. But at least in the first instance try to relate whether it was Mr. Holzwroth, Mr. Eckart or Mr. McMahon, what he said and what you said, and give us the whole conversation. Okay?

A We were at the bar downstairs.

THE COURT: Who was at the bar?

A I, Mr. Holzworth, Mr. Eckart, Mr. McMahon, Earl Stewart and Bud Morrison, and the discussion was centered -

THE COURT: It wasn't the discussion was centered. What sas said? We are not interested in topics. What was said?

A I was introduced to these individuals as the president of Nabcor and that I would be -- Ruckle Pontiac would be selling me automobiles.

THE COURT: Who said that?

THE WITNESS: Earl Stewart.

THE COURT: Go ahead.

A And Mr. Holzworth, the zone manager, was elated over the prospect that I might be selling --

MR. KLEINBARD: If your Honor please--

THE COURT: Look --

Q Mr. Maiorana, could you state what he said and what you said to him, please.

A Well, he said he was anxious to sell as many Pontiacs as he could because Pontiac was interested in becoming -- getting third place, next to Chevrolet and Ford, and they were interested in achieving this goal and they were anxious for me to purchase and sell as many automobiles as we could possibly take, Pontiacs, so that they could get this third-place position which they wanted. In fact, he gave me a pin, which was a little gold pin that they were issuing to I guess good customers or whatever, which 2as a lapel pin. A number 3 was all it was.

Q During that period were you buying cars from Ruckle Pontiac?

A Yes.

Q Did the subject of what Nabcor did with these cars come up at the meeting, at the NAFA meeting with these employees of GM?

A I explained my brokerage system to them, that we sold cars through a system of automobile brokers, and they said, "Sell a thousand cars" -- Mr. Holzworth said this -- "or as many as you can." He said, "We are anxious to get rid of as many cars as we possibly can."

He did state --

Q Who is "he"? I am sorry.

A Mr. Holzworth I think during the conversation said that maybe we should get a fleet certificate and ask Earl Stewart to make the necessary arrangements. This was the distance of it, and this was how it evolved that Walter Gray came to visit us.

Q Was Mr. Stewart there at the meeting when Mr. Holzworth stated that?

A Yes.

Q Did you receive anything from Mr. Holzworth or either of the other employees of GM at that time?

A Yes. This with the number 3 on it.

MR. PERSON: I would like to offer in evidence Exhibit 469.

MR. KLEINBARD: There are five cards. We have no objection to the introduction of three cards of the three gentlemen he mentioned, Holzworth, Eckart and McMahon, as evidence of the fact that he has the three cards. That's all.

THE COURT: What about the other two?

MR. PERSON: They are not related to this transaction.

THE COURT: Take the other two off then.

MR. PERSON: Yes, your Honor.

(Pause.)

THE COURT: With that change Exhibit 469 is received.

(Plaintiff's Exhibit 469 was received

in evidence.)

BY MR. PERSON:

Q Do you recall receiving those cards from the gentleman named on the cards?

A Yes.

Q When did this take place?

A At the same meeting.

Q Did there come a time when you met a Mr. Walter Gray?

A Yes. Shortly thereafter I got a visit from Walter Gray from the fleet section of the Pontiac zone.

Q What zone was that?

A New York zone.

Q Is that the zone that Mr. Holzworth is the zone manager of?

A Yes.

Q Where did this meeting take place?

A At the Westchester Town House.

Q That was your office?

A Yes.

Q Do you recall approximately how long after this meeting with Mr. Holzworth this occurred?

A A couple of weeks.

Q Can you place it as to the month of the year?

A It seems to me it was in the latter part of November or early part of December.

Q Did you have a discussion with Mr. Gray?

A Yes.

Q Could you state what you said to him and what he said to you?

A He started to ask a lot of questions about cars that we had registered, whether we had any cars registered in our name. I told him no, that we sold cars through a brokerage system, and we had been doing this.

I was sure that Earl Srewart had apprised him of this.

He says, "Yes, I know you are selling these automobiles or bootlegging them, and as far as we are concerned that's not what I'm here for. I want to know if you have any cars registered in your name."

I said, "We don't register the cars in our names. Our system is that if one of our brokers sells an automobile he sends the order in to us and we order it, and when the car comes in we, being dealers ourselves, register the car in the name of the customer. That completes the transaction. It's a sale. We do not have any cars registered in our name, but we do purchase these automobiles and we are a purchaser of cars in volume, and we can give you a list of purchases that we have had."

He said "Fine," and I gave him a list. He wanted I believe a list of 20 purchases that we had made. I believe it was 20. I gave him a list of those serial numbers of cars that we had purchased and he asked various other questions and said he would get back to me.

THE COURT: Where did you say this meeting was?

THE WITNESS: At our offices at the Westchester Town House in Yonkers, New York.

Q Was Nabcor purchasing Chevrolets from any sources at that time of the meeting with Walter Gray?

A Yes.

Q State the sources, please.

A We had been purchasing some cars from Luby Chevrolet and we had entered into an agreement with Don Allen Chevrolet at 57th and Broadway for the purchase of Chevrolet automobiles through that dealership.

Q Do you recall if you already and entered into an agreement with Don Allen before your conversation with Mr. Gray?

A Yes.

Q Did the names of any specific dealers arise during the course of your conversation with Mr. Gray?

A I believe Ruckle Pontiac was mentioned and Don Allen Chevrolet was mentioned, Luby and maybe some others.

Q Do you recall if any of the 20 cars which were identified to Mr. Gray came from any of these dealerships, either Luby or Ruckle?

A Yes. Some of the cars came from Luby or Ruckle.

Q Is there anything else you can recall about your conversation with Mr. Gray?

A That was the substance of the conversation, except that he said he would get back to me. I believe he did. At a subsequent meeting he came up again, only this time he wanted registrations --

MR. KLEINBARD: There is no question pending.

Q Did you have a subsequent meeting with Mr. Gray?

A Yes.

Q Where did this take place?

A At the Westchester Town House.

Q About how long was the length of the meeting?

A About a half hour.

Q How long after the first meeting with Mr. Gray?

A A couple of weeks.

Q Was there any discussion earning a fleet certificate?

A Yes.

MR. KLEINBARD: I think at this point he ought to stop leading the witness, your Honor.

THE COURT: Just ask him what happened.

Q State the conversation you had with Mr. Gray, both what you said to him and what he said to you.

A He came back and he wanted now 20 cars that were registered in our name. He wanted tag numbers and registration cards which were registered in the name of Nabcor. I told him at our first meeting that we sold cars, we put them right in the customers' names and we did not register the cars in our name, we did not have any automobiles that were registered in our name.

The only thing I could give him was the cars that we purchased, and from what I understand being a volume purchaser, we purchased over 20 automobiles per year, we would be entitled to a fleet certificate.

That was the purpose of his visit originally which stemmed from our original meeting with Holzworth and his suggestion to Stewart to apply for one.

MR. KLEINBARD: I move to strike with respect to purpose, your Honor.

THE COURT: Motion denied.

Q Did you have any subsequent communications with Mr. Gray?

A No, except that when that meeting terminated --

THE COURT: The question was did you have any subsequent communciations with Mr. Gray. Did you or didn't you?

THE WITNESS: I don't recall, your Honor. I do know that the fleet certificate was rejected.

THE COURT: Did you have subsequent communications or don't you remember?

THE WITNESS: I vaguely remember that there might have been a telephone call, but I'm not sure whether it was with Mr. Gray or whether it was communicated to me by Earl Stewart.

Q Did you receive a fleet certificate at any time subsequent to that?

A No.

volunteered about "they refused." I will not permit it. I am striking it. I think you have heard enough that you should not be volunteering that.

Q Mr. Maiorana, rather than using any term such as that, could you just state what your conversation was?

Who was the conversation with, Mr. O'Brien?

A Yes.

Q Could you please state what you said to him and then what he said to you.

A I asked him why he wouldn't deliver us the automobiles as per our original agreement and he said we didn't have a fleet certificate and that he had called the zone to find this out, they are shutting us off all over the place, he said, "And I can't give you cars."

I asked to then talk to, you know, his superior, and I spoke to Victor Goldsmith.

Q When was this, approximately?

A In the same -- in December of 1966.

MR. KLEINBARD: Your Honor, I would just move to strike the answer as to my client, hearsay and relevancy.

Q Can you state --

THE COURT: Just a minute.

MR. PERSON: Your Honor, I would like to be able to have a kind of direction, that is, instruction, of the kind that we talked about in chambers.

THE COURT: Let me just finish a note or two and then I will talk with the jury.

The jury is going to have to deal with an additional problem here, but I think you can, and I don't think there will be too many instances where this problem will come up.

So far what I have been instructing you about are situations where evidence has come in about talks between Mr. Maiorana and a dealer or a letter or an order between Nabcor and a dealer which doesn't mention General Motors, no mention of General Motors, and I have told you that you have to be concerned about whether there is evidence to connect that up with General Motors in some way relevant to this case, namely, through evidence of the alleged conspiratorial type of activity.

Now you have a little harder point here. We can't have separate trials for Paragon, separate trials for General Motors. We would be at this case for seven years. Maybe not quite that, but something too long. So we have combined the trial here, combined the trial against Paragon and the trial against General Motors.

Now you have a piece of testimony in which General Motors is referred to. Mr. Maiorana says that Mr. O'Brien says that he talked to the zone, meaning General Motors, and they are shutting Nabcor off all over the place, and so forth. Obviously Mr. Maiorana is testifying to O'Brien saying something about what General Motors said and intended and so forth.

Now, here is a piece of hearsay testimony referring to General Motors. That testimony is admissible against Paragon, you can consider it against Paragon, and if you were tallying up points for and against the case against Paragon this is something you could consider.

Of course, you just started to hear the evidence and you have to consider whether this is credible evidence and you have to consider any evidence that Paragon puts on and so forth. I am just saying you can consider it, it is a piece of evidence. Whether you ultimately believe it or not, that isfor you to decide.

But at this point, even though it refers to General Motors, you have got to realize that as to General Motors it is of somewhat different quality. It is not an admission directly by General Motors. It is not even evidence of such an admission. As to Paragon, you have got Mairana testifying as to what O'Brien said. Okay? So that is one type of evidence. But Maiorna is not testifying as to anything General Motors said to Maiorana or in Maiorana's presence. He is simply testifying to something which is the purest hearsay as to General Motors, he is testifying that O'Brien said that the zone said.

So I have got to ask you to really give this no weight as to General Motors, because the man from the zone who allegedly said this, Maiorana did not hear him say it nor si he in court nor is O'Brien in court to testify.

I know that is somewhat difficult to follow, but we won't have many instances of this. Again, when it comes time at the end of the case to evaluate this we will try to make it clear. Right now I am just simply saying that you can consider this evidence for what it is worth as to Paragon, but it really means nothing as to General Motors because it is a very attenuated, hearsay proposition.

Okay. Go ahead.

MR. PERSON: Your Honor, you are referring that it is hearsay as to General Motors but not as to Paragon.

THE COURT: Right.

BY MR. PERSON:

Q Did you have any conversation with Mr. Goldsmith concerning the nondelivery of the automobile?

A Yes.

Q Could you state what you said to him and what he said to you?

A I asked him why I couldn't get any cars, that he was supposed to be the biggest Oldsmobile dealer in the country --

MR. WEISBERG: Objection, your Honor.

THE COURT: No.

Q Is that what you said to him or he said to you? Did you say to him?

A I said --

THE COURT: You are now getting into what you say was the conversation, right?

THE WITNESS: Yes.

THE COURT: Objection overruled.

A He had one of the biggest fleet departments of any Oldsmobile dealer in the country and he was certainly willing to sell us cars, he said, but --

Q I want to try to make sure that you state what you said to him and?or what he said to you rather than any conclusions, if you can. What did you say to him specifically?

A I told him I would like to buy cars from him.

He says he couldn't sell us cars because the zone wouldn't let him because we didn't have a fleet certificate and we were bootlegging cars.

He said, "If I was making three or four hundred dollars, you know, on these automobiles, then maybe I would sell them to you, if I could put them in the customer's name," he said, "and even then I don't think I would take a chance."

MR. KLEINBARD: Your Honor, I ask for the same instruction with respect --

THE COURT: Yes. I don't think it has to be repeated. The same instruction goes. I think the jury has the point. Let the witness finish.

Have you finished?

THE WITNESS: No.

BY MR. PERSON:

Q Was there anything further in that conversation?

A I --

Q Yes or no. Anything further?

A Yes.

Q Would you go on, please.

A I went into a discussion about a Supreme Court decision, that, you know, General Motors couldn't tell him who to sell cars to, that he could sell us automobiles, and the fact that we were selling cars, we were allowed to sell automobiles.

He said, "Look," he said, "I have good relationships with the factory," he says, "and I can't afford to lose my franchise, and that's it, I am not going to sell you any automobiles."

Q When did that conversation take place, if you can recall?

A December, '66, the early part of January, around December.

Q Did you have any subsequent communications with Mr. O'Brien?

A I don't recall.

Q Did you have any subsequent communications with Mr. Goldsmith?

A Yes.

Q How many?

A One.

Q Could you state when that occurred?

A 1969.

Q Where did this take place?

A In New York.

Q Was it in person or by telephone?

A Well, in a telephone conversation, and we set up a meeting. I was to meet him at the offices of Paragon Leasing Company.

Q Is there anything else to your telephone conversation with Mr. Goldsmith at that time that you haven't said?

A Yes. He had put --

MR. WEISBERG: Your Honor, I object at this time.

THE COURT: Yes. Stick to what was said.

MR. WEISBERG: Your Honor, I object at this time. Could we meet at the side bar for a moment?

THE COURT: No.

MR. WEISBERG: I am objecting on the grounds of hearsay, your Honor.

THE COURT: Was Mr. Goldsmith in 1969 with Paragon?

MR. WEISBERG: No.

which he is refusing --

THE COURT: It is not the context; it's the question as to whether there is admissible evidence as to Paragon, and I think the first part is admissible against Paragon.

(In open court.)

THE COURT: Mr. Person is going to ask Mr. Maiorana about the conversation in late '68 or early '69 that he started to deal with earlier. That conversation will be received as it relates to Paragon, but again it is inadmissible hearsay as far as General Motors, so you will have to try to deal as best as you can with that kind of limiting instruction.

BY MR. PERSON:

Q You received a card from Mr. Goldsmith and this has been introduced in evidence, Exhibit 58, this card states "Paragon Oldsmobile, Inc., Victor Goldsmith, President," and an address out in Woodside, New York.

Do you recall when you received that card from Mr. Goldsmith?

A At our meeting in the early part of 1969.

Q Where did this meeting take place?

A In the building in mid-Manhattan somewhere. I don't recall.

Q Was it the office of any company?

A Paragon Leasing.

Q I want to indicate that I'm not going to ask you for the entire conversation and I'm going to draw a limit at a particular point --

THE COURT: The best way, you ask about a particular subject, and even though it may be a little leading I think you better do that so we can enforce what we ruled on at the side bar.

Q Could you state what you said --

THE COURT: Listen very closely and keep within the bounds of the question.

Q Could you state what you said to Mr. Goldsmith and what he said to you about Paragon selling cars or not to Nabcor.

THE COURT: But not about anything else. Just about Paragon.

A That he would like to sell cars to us if we got a fleet certificate and got a leasing company, but he had very good relations with General Motors and he could not jeopardize those relations, so he could not deal with me.

Q One last question. Did he indicate from whom you might be able to obtain automobiles?

A Yes.

Q Can you state what he said about that alone, that subject matter?

A He said that I might be able to get some help from Raines.

Q Did the name Stern & Haskell come up?

A Yes.

Q What type of company was Stern & Haskell?

A Stern & Haskell had been in the discount business. At the time we were speaking? At that time they were in a used-car wholesale operation.

Q Did Mr. Goldsmith suggest that you contact Stern & Haskell with respect to possibly obtaining new cars?

A Yes.

Q Did he state why he was giving you this information?

A Yes.

Q Could you state it, please?

A He said that Dick Stern and Raines were partners in a discount operation.

Q If it is out on the Island don't mention it.

THE COURT: In other words, he suggested you go to Stern & Haskell.

Let's leave it at that.

Q Did he state the reason why you should go to Stern & Haskell?

A Because Ray Raines had a Cadillac dealership.

Q Did Mr. Goldsmith indicate that he wanted to help you get cars?

A Yes.

Q Did you have any further conversations with Mr. Goldsmith or Mr. O'Brien after that?

A No.

Q I would like to direct your attention back to Ruckle Pontiac back in February, 1967. If you recall these purchase orders that had been received in evidence for nine automobiles, did you obtain the automobiles from Ruckle Pontiac which were the subject of these purchase orders I am holding?

A No.

Q Could you describe what happened with

MR. KLEINBARD: I object, your Honor.

THE COURT: Overruled.

A We discussed the possibility of Don Allen Chevrolet supplying Nabcor with new automobiles. I explained the Nabcor system, the brokerage system. In fact, Earl Stewart explained it to him also at the time he introduced him to me, and his position was that "Maybe you can sell him Chevrolets, but don't sell him Pontiacs, because we are selling him the Pontiacs."

THE COURT: Who's position?

THE WITNESS: Earl Stewart's.

THE COURT: Stewart's?

THE WITNESS: Yes. Don Allen Chevrolet also sold Pontiacs and Earl Stewart wanted to continue to sell us Pontiacs.

THE COURT: In other words, he said he wanted to, you are not talking about just his state of mind, this is something he said?

THE WITNESS: Bud Morrison? Yes.

THE COURT: All right.

A (Continuing) That he would be very happy to supply us with automobiles. He told us he sold 10,000 automobiles on fleet per year and he would -- we discussed the price and I suggested 50 over, $50 over dealer invoice made ready less 1 per cent, and he suggested, "Why don't we make it a straight $25 over invoice, so we don't get into a lot of mathematics with, you know, the 1 per cent being $30 or $25 or $34, or whatever it might be."

So we agreed to a figure of $25 over invoice straight on any Chevrolet automobile.

Q Do you recall approximately when this conversation took place with Mr. Morrison?

A That day at the showing, at the showing of the '67 Pontiac at the Ruckle Pontiac showroom. It was in October.

Q I would like to show you Exhibit 525 in evidence and ask if that letter reflects the agreement that you reached with Mr. Morrison.

A Yes, this is the --

Q How did you happen to receive this letter from Mr. Morrison?

A He mailed it to us.

MR. PERSON: I would like to read this letter.

THE COURT: All right. Go ahead.

MR. PERSON: It's from Don Allen Mid-Town

Chevrolet, Inc., General Motors Building, 1775 Broadway, New York, New York, from M.C. Morrison, National Fleet Sales Manager, November 2, 1966, Nabcor, attention Mr. Frank Maiorana.

(Mr. Person read from Plaintiffs' Exhibit 525 in evidence.)

Q Did Nabcor at that time, on November 2, 1966, have a source of supply of Chevrolets?

A Yes.

Q Could you state the source or sources?

A We had Luby Chevrolet that we were getting Chevrolets from.

Q Where was Luby Chevrolet located?

A I believe it was in the Bronx.

MR. PERSON: I would like to show this to the witness, without marking it for identification.

MR. KLEINBARD: Can we see what it is?

THE COURT: I have everything marked for identification that we use here. Give it a number.

MR. PERSON: We just want to stipulate to the address. The correct address is in Forest Hills.

THE COURT: Correct address of what?

MR. PERSON: Of Luby Chevrolet.

THE COURT: All right.

Q Did Nabcor ever purchase any cars from Luby?

A Yes.

Q Did Nabcor ever have any orders for cars placed with Luby which cars were not received by Nabcor?

A Yes.

Q Do you recall approximately when Nabcor experienced the inability to obtain its ordered cars from Luby?

MR. KLEINBARD: I object to that, your Honor.

THE COURT: Overruled.

A I believe it was in March of 1967.

Q Do you recall whether you placed any orders with Mid-Town Chevrolet?

A Yes.

Q Do you recall approximately the first order that was placed with Don Allen Chevrolet?

THE COURT: I think you are using Allen and Mid-Town. You better bring out what happened.

Q I am talking strictly about Don Allen Chevrolet. If I said Mid-Town before it's only because the name Don Allen includes Mid-Town.

Do you recall when Nabcor placed its first order with Don Allen Mid-Town Chevrolet?

A Immediately after receipt of that letter from Bud Morrison, which would have been a day or two after that.

MR. PERSON: I would like to offer in evidence Plaintiffs' Exhibit 450 for identification, which is the Nabcor logbook.

MR. KAPLAN: Your Honor, it would be helpful to us if Mr. Person would tell us exactly what it is he thinks this book is before we have to decide whether we object to it.

MR. PERSON: Should we have the witness testify to what the book is?

Q Mr. Maiorana, I am showing you Plaintiffs' Exhibit 450 for identification. Could you please take a look at the exhibit.

A Well, this is our order journal, in other words, the cars that we ordered. On the dates that they were ordered they were entered into this journal.

THE COURT: Okay. You want to introduce the whole journal?

MR. PERSON: Yes, sir.

THE COURT: Any objection?

MR. KAPLAN: I would like a couple of brief questions on voir dire.

THE COURT: Go ahead.

MR. KAPLAN: If I can approach the witness.

THE COURT: Sure.

VOIR DIRE EXAMINATION

BY MR. KAPLAN:

Q Mr. Maiorana, as Nabcor received orders from brokers were those orders entered in this Exhibit, Plaintiffs' 450?

A These were the orders that we placed with our suppliers.

Q And those were for cars that you received orders for from your brokers, is that right?

A That's right.

Q Isn't it a fact that as you received the orders from the brokers those orders were entered into this book?

A Not to my knowledge. I don't know.

THE COURT: Let me hear your question again, Mr. Kaplan.

MR. KAPLAN: If the reporter could read it back, your Honor.

(Question read.)

A They may have been. But I will have to check that.

Q Let me invite your attention here to the page it's opened to, which is numbered 30060. There is a column here headed "Dealer Name" and the first naem there is New Jersey Discount Auto Sales. That was a Nabcor broker, true?

A Yes.

Q And it has a date right next to it, it says May 16th, is that right?

A Yes.

Q And then further over a half a dozen columns it says "Factory Dealer, Bell Buick," for that particular line, true?

A Yes.

Q Then it has a delivery date even farther over.

A Yes.

Q So isn't it a fact, sir, that as you received the orders from the brokers you first entered those orders in the book and then when you ordered the car from a dealer you entered that in the book?

A I don't know if that was the arrangement. I couldn't -- I didn't keep this book.

THE COURT: Now look, Mr. Person is seeking to introduce this on the basis of your testimony. Is this a Nabcor book?

THE WITNESS: Yes.

THE COURT: And it says what it says and we can all read it, right?

THE WITNESS: Yes.

THE COURT: Do you have any objection to this book, Mr. Kaplan?

MR. KAPLAN: I think the foundation is inadequate unless Mr. Person is prepared to stipulate that the broker orders were entered here, because the witness certainly doesn't know what it is.

THE COURT: Isn't that what it says? Can't we read?

It says what it says. I will receive it.

MR. KAPLAN: All right.

(Plaintiffs' Exhibit 450 was received in evidence.)

THE COURT: Does this embrace a period of time, Mr. Person?

MR. PERSON: Yes, it does, your Honor.

THE COURT: What period of time is it?

MR. PERSON: Throughout the history of Nabdor's ordering.

THE COURT: Is this complete?

MR. PERSON: It is not complete, no. It was kept in the ordinary course of business, but there are exceptions.

THE COURT: I am asking you could we go to that and find a complete rundown of all the cars ordered from brokers to Nabcor.

MR. PERSON: Substantially complete, your Honor, yes, but not totally.

THE COURT: All right. I will receive it.

MR. PERSON: I would like to direct the witness' attention to page 10038 of the log at line 11.

THE COURT: I want to say to you, Mr. Person, if there is any entry that is relevant you can simply read or summarize it the jury. It is in evidence now and you don't need to ask the witness to --

MR. PERSON: I have one point in here that I think --

THE COURT: You are perfectly free to read or summarize what is in evidence to the jury.

BY MR. PERSON:

Q This is an entry which I will read. The date of the entry is 9/26 and it is a Corvette, a '67 Corvette, which has as the date ordered 10/3/66, Luby Chevrolet, but that entry is crossed out.

Could you state from that line where the order was then placed?

A Don Allen Chevrolet.

Q And what date?

A On 11/3/66.

Q And that is one day after the letter?

A Right.

MR. PERSON: I can read other lines. I have a list and I will just read some other entries that are all orders of Nabcor placed with Midtown Chevrolet, according to this logbook.

MR. KLEINBARD: Could we have it Don Allen rather than Midtown?

THE COURT: I think you better keep those straight.

MR. PERSON: All placed with Don Allen Chevrolet.

THE COURT: Okay.

MR. PERSON: At line 35 on the same page, on 10/10/1966 a '67 Chevrolet was ordered, placed with Luby Chevrolet on 10/11/66, and the same crossing out has occurred, and the order was replaced with Don Allen on 11/3/66.

On page 10039, at line 1 there is an 11/3/66 order placed with Don Allen which previously was at Luby Chevrolet, ordered from Luby at 10/11/66.

On line 26 of the same page there is an order placed directly with Don Allen on 11/16/66.

At page 10040, line 2, there is an order placed directly with Don Allen on November 7, '66, line 6 indicates an order placed October 8, 1966 with Don Allen, November 14th --

THE COURT: The date of the last order with Allen was October 8th?

MR. PERSON: It says 10/8/66.

THE COURT: Okay.

MR. PERSON: Then the next one, line 8 --

THE COURT: The lines and all don't --

MR. PERSON: Okay. The next one is

November 14, 1966, then 11/15/1966, 11/16, 11/16, and the last one is 11/28/1966.

THE COURT: Wait a minute. 11/15/66 and what came after that?

MR. PERSON: 11/16, 11/16 and 11/28.

THE COURT: You mean two on 11/16?

MR. PERSON: Correct.

THE COURT: And then 11/28?

MR. PERSON: Correct.

THE COURT: So you have a total of how many orders from Allen?

MR. PERSON: A total of 11 orders indicated here.

THE COURT: All right. Ladies and gentlemen we will recess a bit early until 2:15.

(Luncheon recess.)

AFTERNOON SESSION

(2:25 p.m.)

FRANK MAIORANA resumed.

DIRECT EXAMINATION CONTINUED

BY MR. PERSON:

Q We were talking about Don Allen Chevrolet. I read from the log of Nabcor 11 orders that were placed by Nabcor with Don Allen Chevrolet.

Did Nabcor receive any of these orders during the period 1966?

A No.

Q Did you make any inquiries concerning these orders?

THE COURT: When you say received the orders you mean received the cars ordered?

Q Did you receive any of the cars ordered during 1966?

A No.

Q How long does it take, in your own experience, for cars to be received from the factory after they are ordered by a franchised dealer of General Motors?

A Four to six weeks.

MR. KLEINBARD: I object, your Honor.

THE COURT: Overruled.

Q Did you make any inquiry of the dealer, Don Allen, concerning these orders which had not been received?

A Yes.

Q Could you tell me approximately when you communicated with Don Allen, if you did communicate?

A That was Midtown by the time I communicated with them. They had been taken over by General Motors. Don Allen had been taken over by General Motors.

THE COURT: I think that could be the subject of a stipulation.

MR. KAPLAN: On or about December 12th, your Honor.

THE COURT: Prior to December 12, 1966 the Chevrolet dealer in question was called Don Allen Chevrolet and was a regular independent franchised Chevrolet dealer. Commencing December 12, 1966 this dealership was acquired by General Motors through mechanisms we don't need to worry about, but it was acquired by General Motors and was therefore owned by General Motors itself and was operated under the name of Midtown Chevrolet.

Is that okay so far?

MR. PERSON: That's correct. Not as a separate corporation but as part of General Motors.

THE COURT: I think that's exactly right.

MR. KLEINBARD: The only modification is that for a brief while it was known as Pontiac as well as Midtown Chevrolet.

THE COURT: Let's eliminate that.

MR. KLEINBARD: All right.

THE COURT: That's stipulated and we can go on from there.

BY MR. PERSON:

Q Just to make it clear, did you have any discussions at all with anyone from Don Allen Chevrolet before this date of the take-over concerning any of the orders which had not yet, by that time, been received by Nabcor?

A Yes. There were discussions with personnel there that some of the cars had come in.

Q Did you yourself have any discussions with any persons at Don Allen before the take-over concerning any of these cars that had not been received by Nabcor?

A Bud Morrison --

Q Excuse me. If you can answer just yes or no it will be better that way.

A Yes.

Q You yourself had spoken with Morrison, and who was he at that time?

A He was still the national fleet manager for Don Allen until General Motors took it over.

Q Can you state what it is that you and Mr. Morrison talked about concerning any of the orders that were not yet received by Nabcor?

MR. KLEINBARD: I object to the Morrison end of the conversation, your Honor.

THE COURT: Yes. Even though it's a little difficult, you had a good framework if you get hsi end of the conversation. That's a pretty good way to proceed.

MR. PERSON: I would argue that a predecessor relationship would allow the testimony.

THE COURT: Let's try it.

BY MR. PERSON:

Q Could you describe just your end of the conversation with Mr. Morrison prior to the take-over concerning any orders not yet received by Nabcor, any cars not yet received?

A They had received IBM cards specifying delivery dates --

THE COURT: What is your end of the conversation? Tell us that. There can be other evidence to fill in but tell us your end of the conversation.

A Well, Bud Morrison was coming to work for Nabcor and I had asked him, you know, to follow up on these automobiles and with any of the cars not yet or scheduled to be available. I told him to proceed -- I told him to follwo up on the cars that had come in or were coming in at that time, which was in that part of December.

Q What date, approximately, if you can recall?

A I would say the first or second week of December.

Q Did Mr. Morrison subsequently change employment?

A Yes. He came to work for Nabcor.

Q Do you recall approximately what time

he came to work for Nabcor, what date?

A On the date of the take-over, give or take a day or two.

Q Did you communicate with anyone at this division of General Motors which we will call, and is named, Midtown Chevrolet? Did you communicate with anyone at Midtown Chevrolet concerning these automobiles that were ordered by Nabcor?

A Yes.

Q When did you communicate with somebody?

A In January, the early part of January.

Q Who is it you spoke with?

A Bob Englert.

Q Do you know what his position was at that time?

A He had taken over the position that Bud Morrison had as national fleet manager.

Q Could you very carefully describe what you said to Mr. Englert and what Mr. Englert said to you concerning these Nabcor orders?

A It will require a little bit of background --

THE COURT: No, it does not. Answer the question and there will be other evidence that fills in the background.

A I called Mr. Englert and asked him why we were not getting these cars and these cars were in now for approximately two weeks or longer, and he agreed that they were in, and he said he was not going to give us the cars, and I wanted to know why.

He said, "You are bootlegging cars and you are selling them and we are not going to give you the cars. You don't have a fleet certificate. We're not going --

THE COURT: Don't drop your ovice.

A "You don't have a fleet certificate of fleet number."

THE COURT: What else did he say?

THE WITNESS: "And we are not going to give you the cars to sell to someone else."

I told him that we had a contract with Don Allen Chevrolet, that these automobiles were originally purchased from Don Allen Chevrolet, and when they purchased Don Allen, that they had an obligation to live up to the commitments of Don Allen Chevrolet and I wanted those automobiles.

Already we were getting cancellations or threatened cancellations on these cars and I wanted them immediately, that my employees had tried to get these cars from him and he would not give them to them and I wanted to know why; these cars had been laying around for over two weeks.

He said, "I'm not going to give them to you."

I said, "I want to talk to somebody higher than you, that's your superior. These cars are our cars. They came in assigned to us. I want them.

He says,"If you want I'll let you talk to my boss."

BY MR. PERSON:

Q Did you ask to speak to the boss of Mr. Englert?

A Yes.

Q What happened at that time?

A He left the phone for a minute or so and someone else came on. I don't recall his name, but this was his superior.

I described to him what our relationship had been, that we had a contract by letter from Don Allen Chevrolet to sell us cars at invoice plus

$25 for get-ready, and that he had cars that had come in for us and that were there over two weeks; we wanted those automobiles, we had customers waiting. It was creating serious problems for us, and they were our cars and I wanted them.

He said he realized that we had ordered these cars but it was General Motors' policy -- that this was now a General Motors dealership, "And it is our policy," he said, "not to sell cars to people who are going to bootleg them in competition with our dealers." He said, "We are not interested in making a profit here on the automobiles but holding the price up for the outlying dealers. People come into town, we are not going to compete with them, we are going to hold a legitimate price so they can go back to their local dealers and there won't be that much of a price differential. That's our policy and this is the way we are operating this dealership. We are certainly not going to sell them to you so you can undercut their price and defeat our purpose."

I said, "Whatever your position is I would like to purchase from you in the future," and I think that's what prompted that dialogue about what the policy was.

I said, "As far as any future purchases, that's your business. If you don't want to sell us cars I can't force you to, but the cars you have, that you have ordered, are our cars and those cars I want."

He said he would see what he could do about it.

1B

I said, "Any damage I suffer by it I will hold you responsible for. After all, I contracted with Don Allen Chevrolet and not you. Those are my automobiles."

Anyhow, he would see what he could do about it.

Consequently, a week or so later, they told us we could have the cars. By that time --

THE COURT: Who told you?

Q Who said that the cars could be obtained?

A I think Bob Englert called and spoke to one of our people. It might have been Bud Morrison or Ed O'Brien, and he said that we could have the cars.

Q Do you know if any cars were obtained, actually purchased, from Mid-Town Chevrolet?

A Yes. We had replaced a certain amount of the orders. We took two, delivered two, and the rest were either cancelled or replaced, and we were forced to replace them.

THE COURT: Who cancelled them?

THE WITNESS: The customers were cancelled. They had been waiting since --

THE COURT: You said you were speaking of cancellations with Mid-Town. Who cancelled the other eight or nine orders?

THE WITNESS: We did, because our customers had cancelled. In other words, before they agreed to give us cars we had to try to replace these automobiles and --

THE COURT: Wait a minute.

Are you saying you cancelled these cars because your customers cancelled? Is that what you are saying?

THE WITNESS: Yes, or threatening to cancel, so we had to get them elsewhere -- and some cancelled prior to their agreeing to give us the cars, your Honor.

Q Did you have any other communications with Mid-Town Chevrolet concerning any of these orders?

A No. We just took the delivery of the two cars. There was no further dealings with them. They would not deal with us any more.

MR. PERSON: I would like to introduce some documents in evidence, your Honor. I know there will be objections.

THE COURT: Are these the documents we had over at the side bar?

MR. KAPLAN: Yes. There are three ob-

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Q Did you communicate with Bob Bain Chevrolet concerning any statements that Mr. Strimple had made to you?

A Yes.

Q When did this occur?

A In that time frame period.

Q Whom did you speak with?

A Bob Bain.

Q Did you speak with anyone else there?

A No.

Q How many times did you speak with Mr. Bain?

A Two times.

Q Could you state what you said to him and what he said to you during the first conversation with Mr. Bain?

MR. KLEINBARD: I object on the grounds of hearsay and relevancy, your Honor.

THE COURT: Go back --

MR. PERSON: He is a defendant in the action, your Honor.

THE COURT: Again, we have a situation like Paragon where the statements of anybody from Bain will be admitted as to Bain, but they cannot be considered against General Motors, admissions or anything about

General Motors, because we have that hearsay problem again. Let's do our best.

Q Could you state what you said to him, Mr. Bain, and what he said to you, during the first conversation?

A I told Mr. Bain I received a call from Dale Strimple relating to me that in his efforts to get a source of supply in the Buffalo area he had spoken to Mr. Bain who was willing to sell automobiles to him but was concerned about the oayment of these automobiles.

I related to Mr. Bain Dale Strimple's telephone conversation to me, that Bain had told him that if he could have some assurance of payment he would be willing to sell cars on a fleet basis, to sell to his customers. Mr.Bain agreed, yes, he had spoken to Dale Strimple and he had had this conversation with him. He said, "As far as I am concerned, I know he is selling cars and I am willing to sell him the cars, but I know" --

THE COURT: This is something Bain said to you?

THE WITNESS: Yes, your Honor.

THE COURT: What did he say to you?

THE WITNESS: He said that he had had this conversation with Dale Strimple. He was willing to sell him cars. He knew that he was selling cars to customers; that he was selling the automobiles. He was not concerned about that part of it. The only thing he was concerned about is that he knew that Dale Strimple did not have any money and he was concerned with getting paid for his automobiles.

So I told Mr. Bain, I said, "Would you be satisfied if we purchased the automobile, Narcor, Incorporated, from Bob Bain? We will pay you with our check and then we will resell the cars to Dale Strimple or his customers. Would that satisfy you?"

He said, "As far as I am concerned, that's perfect."

I said, "Would you send us then, if you are willing to sell us automobiles, a letter to that effect so that we can start ordering cars from you?"

We went into some arrangement as to how Dale Strimple would order the car and when the car came in we would send him a check and Dale Strimple would pick up the automobile and we would peddle the automobile ourselves.

Bob Bain said, "That's fine."

I asked him if he would send us a letter to that effect, that he would sell us the cars, and he said that he would dash one off that afternoon.

I said, "Thank you very much," and that was the end of that conversation.

I called Dale Strimple and I said --

MR. KLEINBARD: I object to that.

THE COURT: Sustained.

Q Did you have a conversation with Mr. Strimple concerning your conversation with Mr. Bain?

A Yes.

Q On the following day did Mr. Strimple and you communicate concerning Bain Chevrolet?

A The following morning --

Q Don't describe the conversation, but you did communicate with Mr. Strimple one more time?

A He called me, yes.

Q After that, did you communicate with Bain once again?

A Yes.

Q Whom did you speak to?

A Bob Bain.

Q Can you please state what you said to him and what he said to you. This is the second conversation.

A I told him that Strimple had called me and told me that he would not sell him cars; that he had called the zone and found out that we didn't have a fleet certificate, we were bootlegging cars, and that --

THE COURT: I am not sure who is saying what.

Mr. Reporter, please read that back.

(Record read.)

THE COURT: Start over and don't say "he" but say who.

THE WITNESS: Dale Strimple --

THE COURT: You told Bain something, right?

THE WITNESS: That Dale Strimple had called me and told me that Bob Bain had called the zone, Chevrolet zone, and found that Nabcor was bootlegging cars and that we didn't have a fleet certificate and he should not sell us cars.

I said, "I just talked to you last night and you told me it was all right."

THE COURT: In other words, you went on to say to Bain the following --

THE WITNESS: I said, "You knew that Dale Strimple was selling me automobiles. You didn't care about that. I thought this was all arranged. You said you were going to send me a letter."

He said, "That's true, but I do have to check with the zone, and I called them and they have a whole file on you here. They know you are shipping these cars all over the country. You don't have a fleet certificate. They told me that Ican't sell you automobiles."

He said, "You are a dealer yourself. You know what this could mean. I don't want to lose my franchise."

So I told him, I said, "In line with the Supreme Court decision they can't stop you from selling automobiles to anybody. You have a right to sell those cars and we would like to deal with you. You would like to deal with us."

He said, "Look, you know what they could do to me, and I don't want to discuss it any further" -- words to that effect.

That was the end of the conversation.

I said, "Okay, I'm sorry," and that was that. That was all.

I notified Dale Strimple of what had happened.

THE COURT: We will take a short recess at

MR. PERSON: 84, 397, 398, 399, 396, 130, 406, 311, 247, 309, and 339.

THE COURT: Those are all received. There was no objection to them at the side bar.

xx (Plaintiffs' Exhibits 84, 397, 398, 399, 396, 130, 406, 311, 247, 309 and 339 received in evidence.)

BY MR. PERSON:

Q Mr. Maiorana, do you know a Mr. Tom Cahoun?

A Yes.

Q When did you meet him?

A I met him in 1966.

Q Subsequently, did he introduce you to an employee of General Motors?

A Yes.

Q Who was that employee?

A George Zibold.

Q Do you recall when this introduction occurred?

A The summer of 1967.

Q What was Mr. Zibold's position at that time?

A He was a manager in the foreign department of General Motors, the International Division.

MR. KLEINBARD: Your Honor, may I approach the bench?

THE COURT: Can't we finesse this? Whatever the problem, it does not deserve a side bar.

MR. KLEINBARD: I would like to preserve the record on it. I don't want to do it in the presenceof the jury.

THE COURT: I will permit the testimony and you can make your motion later.

Q Where was Mr. Zibold's office?

A 57th Street and Broadway.

Q Did you meet with him in his office?

A Yes.

Q Could you state what you said to him and what he said to you?

A I was introduced to him by Tom Cahoun and he related --

THE COURT: Who was at the meeting?

THE WITNESS: Mr. Zibold, Tom Cahoun and myself.

THE COURT: When did you say this was?

THE WITNESS: In the summer of 1967, your Honor.

THE COURT: You may proceed.

BY MR. PERSON:

Q Could you state what was said, please.

A Tom Cahoun introduced me as the president of Nabcor and outlined the Nabcor system, and I outlined the Nabcor system, and he said, "Yes, I know all about that. I know the dealers are shutting you off all over the place. I guess that's what you are here for," words to that effect.

But, anyhow, in substance, we outlined the problems we were having getting cars, and he said he knew about it. He said that the manufacturer was tracing the serial number back to our sources of supply.

THE COURT: Who said this?

THE WITNESS: George Zibold, your Honor.

THE COURT: Proceed.

THE WITNESS: And he said, "I doubt whether you are going to get any cars in the New York area." He said, "I don't know of any dealer who will sell you any. I have a brother-in-law that works for the Cadillac Division as a salesman. Maybe if you need a special car for some special vustomer, or something like that, he might be able to help you. You can call him. He would have a limited supply."

I did call him.

Q Where did you talk with his brother-in-law?

A I called him at a phone number he gave me, a 7000 number, or something like that. That was the phone number of the Cadillac showroom of General Motors in the General Motors Building there across from the main corporate headquarters.

I told him I had spoken to his brother-in-law George Zibold, and he suggested that I call him. I told him who I was and what my business was and that I could use some automobiles for some special customers.

He said, "I will see what I can do for you."

The upshot of it was, in substance the conversation was, that he could give me cars out of stock possibly and put them in the customers' names selling them as a salesman for about $950 over invoice.

That was not our program. I wanted them at fleet price.

So he said, "I will let you talk to my boss and maybe he could do something for you, but I cannot."

He put his boss on the phone and I talked to him. I told him I had talked to George Zibold and he referred me to his brother-in-law. He said, "Look, I can give you a unit or two from time to time for a special purpose, for special customers, in limited quantities, but I would have to charge you anywhere from $950 to $1100. I would have to pay the salesman a commission and I have to put the car in a customer's name because if the factory found out they would roast me," or words to that effect.

I said, "That's retail. I can buy them that way anywhere. That would not do me any good."

He said, "That's all I can do for you."

Q Is that your whole conversation with him?

A Yes. In substance, that's the conversation.

Q Did you have any additional communications with Mr. Zibold?

A I called him back. I told him, I said, there was not anything I could do with his brother-in-law. We arranged a meeting, Tom Cahoun, George Zibold, another individual in the International Office, and myself, and we went to Luchow's for lunch. We discussed this problem.

He said, "The only way I can help you is maybe through some of our overseas distributors. You would have to go over and see them, make arrangements, and they could sell you the cars and we could deliver them here to your customers."

3 So I said, "That's all right if we can do something like that."

He said, "Okay. I will give you a couple of letters of introduction. You can go out and see them."

We went back to the office and he introduced me to his superior. He said, "Before I give you a letter of introduction I want to clear it."

And I told him briefly what I wanted and evidently it was okay and he gave me two letters.

THE COURT: Who is "he"?

THE WITNESS: George Zibold.

MR. PERSON: I have Exhibits 462, 463 and 468. I offer them in evidence.

MR. KLEINBARD: No objection.

THE COURT: They will be received.

xx (Plaintiffs' Exhibits 462, 463 and 468 received in evidence.)

BY MR. PERSON:

Q First of all, Exhibit 468, this is the calling card of George Zibold, Jr., Foreign Distributors Division, General Motors Corporation.

Do you recall when he gave that to you?

A I think it was when I first met him.

Q These exhibits, 462 and 463, are these the letters of introduction that you referred to before?

A Yes. Bertram Schader and Jaime Jimenez.

Q These two letters of introduction are dated September 26, 1967, on the letterhead of the Foreign Distributors Division of General Motors Corporation. They are signed G.J. Zibold. One is addressed to Mr. Bertram R. Schader and it reads as follows:

"Dear Bertram Schader:

"This is to introduce to you Mr. Frank Maiorana. Mr. Maiorana is a personal friend of mine who is currently engaging in the automotive business here in the United States. Any considerations you may extend to Mr. Maiorana on my behalf with regard to the automobile business would be appreciated."

A similar letter, Exhibit 462, was addressed to Mr. Jaime Jimenez in Madrid, Spain.

Q After you left the office of Mr. Zibold, what did you do?

A I went about taking care of my normal course of business.

You mean in regard to this particular matter?

Q Correct.

A I made arrangements to go to Europe to see these people. In the middle of November I did go to Spain and I visited --

THE COURT: What year?

THE WITNESS: 1967.

Q Did you speak with Mr. Schader?

A Yes.

Q What did you discuss concerning the automobile business?

MR. KLEINBARD: I object to these discussions in Spain, your Honor. What do they have to do with this?

MR. PERSON: I think it is very relevant, your Honor. It shows the effort he was going through to obtain the souce of supply.

THE COURT: Again, we have the same old question. If he is going to quote Schader, Schader is not around. He is not; as far as I know, a General Motors' employee. Schader can't be observed by the jury. I don't know that Schader's deposition was taken.

MR. KLEINBARD: It was not, your Honor.

THE COURT: I cannot allow it. I can find out what he did, but there is a way to have to have it in without getting into conversations which will involve statements by Schader. I can't admit it.

Q State what you said to him, Mr. Schader.

THE COURT: Mr. Maiorana, in a general way, did you go and did you inquire about buying cars from a Mr. Schader in Spain?

THE WITNESS: Yes.

THE COURT: What was the upshot? Did you buy cars or didn't you buy cars? Did you make an arrangement or didn't you?

THE WITNESS: We made some arrangement. He took me to another distributor which was Julio Blintz, who had --

THE COURT: Was Julio Blintz in Spain?

THE WITNESS: Madrid, Spain.

THE COURT: Was Blintz a dealer?

THE WITNESS: He was a distributor.

MR. PERSON: I might say that his letter is one of these letters of introduction.

THE COURT: What was he a distributor of?

THE WITNESS: He had Buick, Cadillac, and Opel.

THE COURT: What was the upshot with Blintz?

THE WITNESS: Blintz was very anxious --

THE COURT: Did you buy cars or didn't you, from Blintz?

THE WITNESS: No. I wanted to, but --

Q Was there a method by which you could have bought cars?

A Yes.

MR. KLEINBARD: I object to that.

MR. PERSON: I will have him describe the method.

MR. KLEINBARD: It is a method described to him by a non-GM employee located overseas, and we are right back to our hearsay problem, if he wants to tell us what Mr. Blintz told him.

THE COURT: The point is that nothing that Blitz or Schader said can bind General Motors and the only thing that can be of interest and use to this jury is simply the fact, for whatever it's worth, that he went to Europe, he says he was attempting to arrange to get cars through this European source, and he didn't get them.

Now, the age-old question is, I suppose, why he didn't get them, and the why involves potentially two sides. The why may involve things that Mr. Maiorana did, the why may involve reasons that are in the mind of or circumstances known to Schader or Blintz, and it is the latter that presents the perennial problem in the case.

I think you are doing quite well to stay within these rather difficult boundaries, Mr. Person, and I just don't know what the situation is here, but I think pending a further discussion, which I don't want to have right now, I would pass that for the moment. It is nearly time to adjourn. Is there anything you can cover quickly?

MR. PERSON: No, your Honor. I am

going into Rohrer Chevrolet at this time.

THE CLURT: Let's have the jury retire and I will speak to the lawyers for a minute.

We will see you at 10 o'clock tomorrow morning.

(The jury left the courtroom.)

THE COURT: Refresh my memory, Mr. Maiorana. What was the situation with the Blintz situation?

THE WITNESS: Well, shall I go into detail, your Honor?

THE COURT: Just start in. I know we had it before on the preliminary hearing but I just don't remember it.

THE WITNESS: What happened is that they were very apprehensive out there. There were originally five Spanish distributors. They had reduced them to three. They cancelled out a couple because of some of these cars were coming into the United States this way.

When I came back I talked to George Zibold again about these arrangements. The arrangements were that I was supposed to supply a name of an individual, one of my customers, who supposedly went to Europe and I would send say the European distributor the name, he would order the car, the car would stay here in the United States and be sent to a dealer near where this individual lived. Then he was to go to that individual dealer and if the dealer -- and Zibold told me this -- "Have your customer, if anybody should ask him, to say that he has been to Europe and he bought this car in Europe."

So I was supposed to work a deceptive practice of this type within our franchise system and our Nabcor system, which I didn't want to do. It was just no good for me and I refused the situation.

THE COURT: You were supposed to do it. The fellow who asked you to do it was this Blintz. How is that --

THE WITNESS: Zibold is the one who told me it had to be done.

MR. KLEINBARD: Your Honor, in the hearing it was Blintz and it is now shifting to Zibold. I am just asking to get the references.

THE COURT: You were in Madrid talking to Blintz, right?

THE WITNESS: Yes.

THE COURT: Zibold was not there, right?

THE WITNESS: No, Zibold wasn't there.

THE COURT: What did Blintz tell you?

THE WITNESS: Blintz said he would be willing to sell us the cars, all we had to do was supply --

THE COURT: Did he talk to you about procedures?

THE WITNESS: No. We had a little bit of a language barrier there. I didn't understand Spanish, he didn't speak English very well. Bert Schader, you know, tried to work out something and said he would try to work out the arrangements.

When I got back into the United States I found out what the arrangements were going to be. I was supposed to give a name, send it out there --

THE COURT: Who did you find out the arrangements from?

THE WITNESS: I talked to Zibold.

THE COURT: What was the testimony on the preliminary hearing?

MR. KLEIN: It's ambiguous, your Honor. It begins at the bottom of 414.

THE COURT: It's perfectly plain to me that when you testified about being told of this method you were not testifying about it being told to you by Zibold, because the testimony on 415 was:

"Q Did you get them through Mr. Schader?

"A No, the whole system had tightened up out there," and so forth.

Then I said, "He asked you if you could get cars through Schader and you said youi couldn't.

"The Witness: That's not the answer, your Honor. I could have on their basis.

"The Court: What was their basis?"

And then you described this procedure that you have just detailed to us a minute ago.

Then you are asked, "How long did you remain overseas?" You said, "Three weeks to a month."

Then the question by Mr. Person was:

"Q Did you have the occasion to communicate subsequently with Mr. Zibold?

"A Yes.

"Q What was that communication?

"A When I came back I told him what happened and Betram Schader was trying to work out some sort of deal and our customer would then go in and say he just got back from overseas," and you told Zibold you couldn't life with that situation.

THE WITNESS: Yes, your Honor, because that was the operation of the foreign department.

THE COURT: Yes, but the question is who was it.

THE WITNESS: Zibold.

THE COURT: I am sorry, Mr. Maiorana. That is not what you said at the preliminary hearing. Now, if you want to change your story, I guess that's your privilege.

THE WITNESS: But that was the basis that the foreign --

THE COURT: The question is who was it that told you, and as you know in this hearing it makes a difference. It may be admissible if it is told to you by Zibold. I don't know. But I don't think it is admissible if it was told to you by some Schader fellow in Madrid.

It was perfectly plain, if this ever happened, and I am not sure it ever happened, but what you were describing in your version of what happened at the preliminary hearing was that this was told to you by the people in Europe and then when you got back you told Zibold you couldn't live with it.

Now, whether that happened, I don't know, but that was your story. Now you have a different story here, as far as I am concerned, and I guess you are now prepared to say that Zibold was the one who outlined these procedures and I have to face the question of whether that is admissible and the jury will have to face the question as to whether you are telling the truth.

MR. PERSON: Your Honor, he has indicated that in both instances that he had talked about this with Mr. Zibold. The question --

THE COURT: I have just gotten through reading the preliminary hearing record.

MR. PERSON: That's what it said. It said that he had talked about this with Mr. Zibold.

I don't think that the emphasis on who brought it up was ever a factor here. It now becomes one.

THE COURT: It was. Have you read this in the last five minutes?

MR. PERSON: I just heard this being read.

THE WITNESS: It was on their method, your Honor, that I would have had to deal. In other words, I would have had to work --

THE COURT: Please. Let's not argue about this. We have a question of whether this evidence is admissible and I suppose the version now is that it was Zibold who outlined this onerous procedure. Is that admissible?

MR. KLEINBARD: May I be heard on that, your Honor?

THE COURT: Okay.

MR. KLEINBARD: It is our position, as I was trying to state earlier, that this evidence is inadmissible because there has been no basis shown that it was within the scope of Mr. Zibold's authority to make this kind of a transaction in the first place, he being concerned primarily with delivery of cars to servicemen returning from overseas. That's as to the scope of his employment.

As to competence, he would have to be shown some basis upon which that he knew what was happening all over New York. You will recall, your Honor, this is a $9000 clerk in our office.

In addition to which, if Mr. Maiorana wishes to change his story, we now have him participating, that is, Mr. Zibold, participating in a scheme to defraud General Motors, which is certainly not within the scope of his authority or the scope of his employment.

So on any basis I cannot see that this testimony --

THE COURT: This is something I think I have skirted, what is the law about the level or the type of person you have to be in order to bind a corporation in a conspiracy case.

MR. KAPLAN: The law, your Honor, is Rule 403 of the Federal Rules of Evidence, which says that one of two things must be met for the evidence to be admissible. Either the statement which is offered must have been expressly -- I am sorry. I misquoted the rule. It's Rule 801.

THE COURT: Wait just a second.

Yes.

MR. KAPLAN: Rule 801(d)(2)(c) and (d), "The person must either have been authorized to make the particular statement in question or the statement in question or the statement had to have been made concerning a matter within the scope of his agency or employment during the existence of the relationship."

As far as we are concerned, there is no evidence whatever that Mr. Zibold was authorized to make any of these statements. Certainly there is no proof that naybody told him to go out and do it.

The question of scope of authority, your Honor heard the testimony of Mr. Lubisco at the preliminary hearing, which you are entitled to consider here. The man was a $9200-a-year clerk. He had absolutely no responsibilities for domestic distribution. His only duties related to the processing of this paperwork that came over from Europe in connection with cars ordered chiefly by returning servicemen. It could not possibly have been within the scope of that man's employment to make statements to Mr. Maiorana or anyone else about what GM's domestic activities or sales policies or whatever oculd possibly have been. It was certainly not within the scope of his employment to hatch a scheme to defraud the company by having people testify tell dealers falsely that they were getting cars in Europe when in fact they were coming through Nabcor.

MR. PERSON: Unless the company is committing some illegal acts and he is trying to help them get cars, and that is really our contention.

MR. KLEINBARD: There is no foundation as to that.

THE COURT: That is a little far-fetched.

MR. PERSON: Also Mr. Lubisco said that he was unaware of the details of the activities of Mr. Zibold, that he couldn't testify as to what things he did. We know that he was in single-car deliveries and that is the same area that he was giving assistance to Mr. Maiorana.

THE COURT: Zibold has died?

MR. KLEINBARD: Zibold is dead, your Honor, and single-car deliveries are clearly not what the Nabcor system was all about.

MR. PERSON: But he was helping out by using those single cars.

MR. KLEINBARD: There is also one other point. I want to make the record here, your Honor.

We have ahd reference to Zibold's brother-in-law, who is unnamed, and to Zibold's brother-in-law's boss, who is unnamed, and to Zibold's boss, who is unnamed.

Again, using the tests of the scope of authority, competence of these witnesses, we don't even know who they are, much less whether they said any of these things, and I don't see how these people can be said to bind the corporation. There is no foundation at all.

THE COURT: The fact that he is a $9000 clerk doesn't mean that he can't --

MR. KLEINBARD: It's not his salary level. It's the scope of his employment. He is processing papers, not dealing with domestic car distribution. How can he be deemed to know what the situation is with respect to car distribution in the City of New York that car dealers all over the city --

THE COURT: What does it mean, a statement by his agent or servant concerning a matter within the scope of his agency or employment?

It depends on how broad or how narrow you read that. I suppose we ought to look up --

MR. KLEINBARD: We can give you some cases, your Honor, tomorrow morning.

MR. KAPLAN: I have two I can give you right now and I will be happy to give you some more in the morning. The two I would cite right now are the Flintkote Company vs. Lysfjord, which is reported at 246 F. 2d 368. The relevant portion begins at page 384.

Secondly, United States against the Bensinger Company, which is at 430 F. 2d 584, at 594 and following.

We will be happy to provide your Honor with whatever else we have in the morning.

THE COURT: Just preliminarily, what do those cases hold as far as --

MR. KAPLAN: They both held either that there was an insufficient foundation as to the nature of the duties and responsibilities of the employees whose statements were offered to permit the testimony to be received or held on the facts that the statements alleged were outside the scope of the agents' authority.

THE COURT: Specifically, what specific guidesare there in the case to help illuminate this idea of whether statements are in or out of the scope of the agency?

MR. KAPLAN: I will take first of all the Flintkote case. The issue there was the admissibility of an alleged statement in a boycott conspiracy case very similar to this one by a man named Ragland. Ragland had started as a field service engineer. He was a promotional and sales employee and at the time in question he was in charge of sales promotion for this company for acoustical tiles, which is the subject of what they were dealing with. The court said that Ragland had no executive duties for the corporate defendant but was a representative at the lower echelon, and it went on, if I recall this correctly, to hold that his statements weren't admissible against Flintkote.

THE COURT: Why weren't they?

MR. KAPLAN: Because he was not an executive employee and because --

THE COURT: I don't understand why it has to be an executive employee.

MR. KAPLAN: Frankly, your Honor, I would have to reread the case, but my recollection of the case is that the man was alleged to have made statements admitting Flintkote's complicity in a conpsiracy to drive someone out of business and his job was to sell acoustical tiles, his job was not to make policy about who the company did or did not sell to or anything of the sort, and if I correctly remember the case, the court said that the sort of statements that were being offered against Flintkote which Ragland had allegedly made were simply not things that he was supposed to be talking about as a Flintkote salesman.

This, your Honor, actually is the reason for our offer --

THE COURT: In other words, you are saying here that whether General Motors was involved -- let's start again.

You are saying that whatever policies, whether they were legal or illegal, with respect to supervising or dealing with franchised dealers -- how do you phrase that general subject, the relationship of General Motors with its franchised dealers, whether they would or would not do anything to prevent sales to Nabcor, that is somkething completely out of the content or bailiwick of Mr. Zibold?

MR. KAPLAN: Precisely.

THE COURT: So if he starts talking about that subject he in effect is just reciting things like almost a stranger would?

MR. KLEINBARD: It becomes gossip in his mouth, your Honor. In other words, there are two problems. One, that he isn't a speaking agent for the corporation, and the second one is one of competence, as to whether his duties place him in a situation where he would be knowledgeable about that which he is talking.

I submit that in servicing cars for returning servicemen he is not knowledgeable as to what alleged domestic conspiracy may have gone on between General Motors and its domestic cealers.

MR. PERSON: Your Honor, he picked up the cars at the same places. In other words, there is only one place he goes to. It's GM he gets the cars from.

THE COURT: What do you mean, he gets the car from the same place?

MR. PERSON: He was involved in single-car deliveries, meaning that he obtained automobiles, that he worked with the people that were delivering these automobiles.

THE COURT: At the most he might chat with them. This isn't just the fact that he has occasion to chat with other General Motors empoloyees. And let's suppose he is told something. It doesn't really bring it within this rule. The rule doesn't say someone who has picked up information from fellow employees.

MR. PERSON: He is not saying that he cut people off. He is saying that others told him --

THE COURT: That's the whole point. The testimony is, and it wasn't contradicted, that he had no connection with the distribution of automobiles in the United States.

MR. PERSON: M.r Lubisco didn't know what the duties were. He wasn't able to state that.

MR.KLEINBARD: I specifically asked him that question, your Honor.

THE COURT: He certainly said he had no connection. There is no proof --

MR. PERSON: On cross --

THE COURT: There is no proof at all, even on your case, there is nothing to establish he had any responsibilities about the relationship of General Motors and its domestic dealers.

MR. PERSON: There is because he went to his boss and got approval to give these letters of introduction.

THE COURT: But that is another subject. That is in relation to foreign dealers.

MR. KLEINBARD: Besides, that came out for the first time today.

MR. PERSON: He was overseas. He was connected in the overseas sense.

THE COURT: Let's take one thing at a time. There was one line of testimony where Mr. Maiorana quotes Zibold as saying "I know the dealers are shutting you off all over the place. The manufacturers are tracing serial numbers to sources of supply. I don't think you can get cars in New York."

Now, that is an alleged admission on the part of a General Motors employee which is supposed to be admissible as other than normal hearsay. That is what I have been focusing on in my thinking in the last few minutes.

Now, there are other problems, but that is the immediate problem that I would like to focus on now, and it would seem to me that in order to comply with the rule you would have to show that that statement, that group of statements, was made by him concerning a matter within the scope of his employment.

MR. KLEINBARD: Your Honor --

THE COURT: And I really must say that there might be close cases. I don't really see how you have shown that this is a close case. It seems to me that he is acting in a capacity divorced from the subject matter he is speaking about.

He is not connected with the relationship of General Motors with its dealers. To him it is scuttlebutt, something he may have picked up, if he ever said this, which I don't know that he ever did.

MR. PERSON: He has a relationship through the paperwork, the same kind of ordering that Habcor did.

THE COURT: I don't think that is anything.

MR. KLEINBARD: Your Honor, there are three questions and answers on page 826 at the hearing transcript. I asked Mr. Lubisco:

"Q What connection with Mr. Zibold have, if any, with the procurement of automobiles for the domestic dealer?

"A None that I know of.

"Q What duties did he have, if any, with respect to the distribution of automobiles in the United States?

"A None.

"Q What authority, if any, did he have to order cars from the factory for distribution to dealers located in the United States?

"A None."

I think that's dispositive on the scope of his employment.

THE COURT: I will read those cases, but I think I just can't conceive of how those statements comply with the rule. I certainly didn't reflect on it before we let them in on the preliminary hearing out of the presence of the jury.

MR. KAPLAN: Your Honor, I do have two other cases. One is a Second Circuit case, Northern Oil Company against Socony Northern Oil at 347 F. 2d 81, which deals with the question of whether an assistant to the district sales manager in the Albany office of Mobil Oil had authority to make statements such as the ones we are dealing with here.

THE COURT: We will have to read those because this is going to be a recurring problem.

The other problem I take it is -- let us assume that Mr. Maiorana is going to ascribe to Zibold the so-called deception. If that testimony is sought to be admitted against General Motors, which of course it is, it seems to me almost a fortiori that that is not within the scope of his employment, because he is attempting to perpetrate a deception against General Motors, and this is really the way that Mr. Maiorana himself regarded it according to Mr. Maiorana's testimony.

MR. PERSON: Why wouldn't that be an admission?

THE COURT: That is the whole point. If the admission was made by someone acting in the scope of his employment it is an admission. If he is acting adverse to General Motors and it isn't within the scope of his employment it isn't an admission. That is the question. I certainly thing we ought to think about it overnight.

We have a problem. The first testimony is in, and I very much regret that, because Mr. Kleinbard tried to signal and I didn't want any more side bars, and I thought I knew what we were doing. I really didn't. The only thing I can do now is, if it is appropriate, grant the motion to strike. I think we just have to be more careful in the future.

MR. KAPLAN: Your Honor, I do have one more piece of authority that may be helpful to you. Your Honor accurately perceived the problem of even if Zibold said these things and even if he was acting within the scope of his employemtn, how did he know anything about it. There is a separate objection here to the fact that there is no showint that even if Zibold was properly speaking for General Motors that he was competent to do so, that he knew anything about the subject, and I would just refer the court to Vol. 4 of Judge Weinstein's treatise on evidence at page 801-139, which deals with that separate problem, in which he says, and I will just quote a sentence:

"Gossip does not become the libel merely because it is heard in the office rather than at home."

I think that is really our point on that.

Thank you.

THE WITNESS: Your Honor, can I clear up a point that was brought up by Mr. Kleinbard?

THE COURT: Yes.

THE WITNESS: He said that Mr. Zibold's function was to sell cars to the military. That is not true. His function was to sell cars to American tourists that would go overseas and these cars could go to any dealer, could go to a dealer in New York, it could go to a dealer near South Carolina, it could go to a dealer in Ohio. That car would be delivered to that dealer in Ohio. Mr. Zibold's function would be to collect the money, take care of the paperwork, to be in touch with that dealer.

THE COURT: What was the function of the dealer in the United States, to do what?

THE WITNESS: To make delivery of that automobile to that person.

THE COURT: Was the dealer reselling it? It wasn't a car that was sold by the United States dealer, was it?

THE WITNESS: It was a car that was sold by the International Division and Mr. Zibold was taking care of the sale of that automobile.

THE COURT: The International Division --

THE WITNESS: And it wasn't only to military personnel, your Honor.

THE COURT: I don't care whether it was military personnel or not. The idea was, I take it, that if someone was in Spain they might be interested in buying a Buick, right?

THE WITNESS: Right.

THE COURT: It mibht be a serviceman, it might, indeed, be a Spaniard moving to the United States, or some other kind of person. But he wanted to buy and he was over in Spain and placed an order, right?

THE WITNESS: Right.

THE COURT: Am I wrong or am I right?

THE WITNESS: Yes, that --

THE COURT: Because normally you and I don't go buying our Chevrolets in Spain through Spaniards, right?

THE WITNESS: Well, a lot of people did because they could save a lot of money by doing it, because big cars did not sell in Spain.

THE COURT: What was the normal intention, that there were entities in Spain set up to sell GM cars, right?

THE WITNESS: Yes.

THE COURT: And Mr. Blintz had to do with that type of selling, right?

THE WITNESS: Yes.

THE COURT: Okay.

THE WITNESS: However, your Honor, there was a quota system there that has great bearing on this.

THE COURT: I am not trying to get into that.

I take it from what you say that you could buy a car through the entity in Spain and youi could get it somehow delivered in the United States, right?

THE WITNESS: Yes.

THE COURT: And you would get it delivered through a dealer, right?

THE WITNESS: Through the international office, which Mr. Zibold would handle.

THE COURT: But you were trying to describe to me the function of the dealer.

THE WITNESS: Yes. The car would go --

THE COURT: It would go to a dealer?

THE WITNESS: Or it would go right to the international office, which would be GM's own facility in New York.

THE COURT: So it would go either to

GM's own facilities, International Division, or to a dealer for the physical handling of it?

THE WITNESS: Yes.

THE COURT: But that dealer would not be making the sale, the dealer wouldn't be buying from GM and reselling, right, in that instance?

THE WITNESS: No, he would get --

THE COURT: The answer is no?

THE WITNESS: No.

THE COURT: And the sale would be made by whom?

THE WITNESS: The international office, and Zibold would be handling it, the collection of the moneys, the sale, the paperwork, all of the details concerned with the delivery of that automobile.

THE COURT: The point we have been struggling with -- I guess it isn't much of a struggle -- is that whatever this process was, it would seem to me it was divorced from the normal process of domestic distribution, it involved different methods, different people, different types of mechanics, it is a different operation.

MR. PERSON: Your Honor, I would like to make an observation, that it is comparable to the

Nabcor system. What he was doing was drop shipping and then he would be in a position to know what was happening to Nabcor. If he drop-shipped with Midtown Chevrolet, which had cut Nabcor off previously, then he was in a position. He was doing what Nabcor was doing.

THE COURT: I don't thing that really answers the problem. Let's suspend for the evening.

THE WITNESS: Your Honor, there was another function.

THE COURT: Let's suspend for the evening.

(Adjourned to October 27, 1976, at 10:00 a.m.)

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NATIONAL AUTO BROKERS CORP.,
et al.,
Plaintiffs,
vs.
GENERAL MOTOR CORPORATION,
et al.,
Defendants.

70 Civ 5 421A

Before: HON. THOMAS P. GRIESA, D.J.,
and a Jury.

New York, October 27,1976;
10.20 A.M.

Trial resumed.

- -

(In the robing room.)

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: On the record.

We started yesterday afternoon to consider the motion of the defendant General Motors to strike the testimony of Mr. Maiorana quoting Mr. Zibold about refusals to deal, and so forth. We all have that in mind. Then we were also considering the admissibility of testimony which is proposed by Mr. Maiorana to the effect that he was told by Mr. Zibold about certain procedures to be used on these alleged foreign orders.

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I have gotten the arguments and the authorities of General Motors, and I really have not heard your side on that fully.

MR. PERSON: I don't have any additional authorities, your Honor. I have not been able to do more than just read and take a look at these cases they have offered.

My client, Frank Maiorana, will offer testimony as to what Mr. Zibold had told him as to Mr. Zibold's duties. That may help to clarify it.

THE COURT: What would that be?

MR. PERSON: He was having contact with divisions of General Motors as well as franchised dealers of General Motors with respect to arranging for a drop shipment of automobiles to these dealers.

THE COURT: I think that's what he referred to yesterday afternoon in a somewhat different way. I don't think that that is enough.

I am going to grant the motion to strike the testimony we are speaking of, the testimony that has already been given. I do not think it needs any further explanation than that.

I think there is a somewhat different problem when it comes to any testimony by Mr. Maiorana about being told of a procedure. The procedure, of course, relates to Mr. Zibold's area of operation, but I guess your point is that it could not be within the scope of his authority because it was --

MR. KLEINBARD: To deceive his employer, yes.

THE COURT: That's a point well taken. I will sustain an objection to that.

On this question of how we proceed, in retrospect I very much regret not having called a side bar. Here I am not trying to rationalize. I think the testimony should be stricken. However, I just wanted to say, gratuitously, that this is one of a string of bases of testimony about this type of admission. I just have to trust that the jury can handle the motion strike.

MR. KLEINBARD: I assume your Honor will comment on that.

THE COURT: Yes.

MR. KLEINBARD: It may have gotten lost in the discussion about Zibold, but I moved yesterday that there had been no foundation laid for the admissiblity of testimony about his unnamed boss, his brother-in-law or his brother-in-law's boss.

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THE COURT: Was there testimony --

MR. KLEINBARD: Mr. Maiorana testified with respect to conversations with each one of those people. We don't know if they exist, who they were.

MR. PERSON: That's something that an answer can be given to.

THE COURT: What testimony are you referring to? Are you making a motion to strike?

MR. KLEINBARD: Yes.

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MR. KAPLAN: Mr. Maiorana testified that Zibold told him he had a brother-in-law who was a salesman at a Cadillac agency that was operated by General Motors, that Maiorana telephoned the brother-in-law; that he told the brother-in-law his conversation with Zibold. The brother-in-law said he would sell possibly a couple of units out of stock but they would have to be in the customer's name and at a price of $955 over invoice.

Mr. Maiorana said it was too high and wound up speaking to the brother-in-law's boss who got on the phone, or at least someone who was so introduced. The boss allegedly told him that he could give him a unit or two but he would have to charge $950 to $1100 over invoice to pay a salesman's commission, and to put the cars in the customers' names, because if the factory found out they would roast him.

As to that segment, this is obviously another deception, in addition to the fact there is no authentication as to who these people were.

THE COURT: If the brother-in-law exists and if the conversation took place this would be a statement by some -- whom did he say his

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brother-in-law was?

MR. KLEINBARD: A salesman.

THE COURT: Wouldn't this be sales talk?

MR. KAPLAN: This would be sales talk insofar as he was talkint to him about selling him a car in the ordinary course of business.

THE COURT: And what the mark-up would be?

MR. KAPLAN: Yes. But as soon as he starts talking about putting it in the customer's name you have the problem that Mr. Person is going to argue that that was because the factory didn't want him to sell that at all; the factory had any right to sell or not to sell.

THE COURT: That goes to weight and significance. Here we have testimony that there was a salesman discussing the mechanics and price of sales.

I think it would be hard for me to say if such a person existed and such a conversation took place, but I can't see that that's out of the scope of his employment. It's a matter, it seems to me, for argument whether this

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proves anything or not. It seems to me the subject matter would be within this man's scope of employment.

The roasting of him by the company --

MR. KAPLAN: That's the same sort of thing with Zibold.

THE COURT: He works for General Motors, right?

MR. KAPLAN: If such a person existed.

THE COURT: But that's a matter --

MR. KAPLAN: If I may, for a moment, that raises a second problem. How would we know who this man was? There is a problem of authenticating here.

We have so far, as the only evidence of who was spoken to, Maiorana's account of a hearsay statement that Zibold told him to call somebody whose name he doesn't remember, and he placed a call and the man then proceeded to make certain admissions, and then we have the further conversation with another unidentified individual whom unidentified man No. 1 puts on the phone.

MR. PERSON: Why don't you show there is no brother-in-law.

THE COURT: I will deny that motion to strike.

I think we are ready to go out.

MR. PERSON: Your Honor, I would like to cover these dealers.

MR. KLEINBARD: Your Honor, we also have the problem of Mr. Zibold's boss. We are striking out the testimony of Mr. Zibold, but then --

THE COURT: What I have just ruled on is the testimony about the brother-in-law. Let's go to the boss.

MR. KAPLAN: The brother-in-law and I take it the brother-in-law's boss. Now we have Zibold's boss. There are four people involved.

THE COURT: Okay. What about Zibold's boss? What did he say?

MR. KLEINBARD: Zibold says he came back with this, in effect, program, as I recall it, program of deception, and that he had to get his boss' okay to the issuance of those letters.

MR. PERSON: That was no deception.

MR. KLEINBARD: Which again would be his boss' participation in this program.

MR. PERSON: There was no deception at that time, your Honor.

THE COURT: Wait a minute.

MR. KLEINBARD: Also I have difficlty in understanding if Zibold --

THE COURT: I am not clear. What did Mr. Maiorana say that Zibold's boss said?

MR. KAPLAN: The testimony was that Zibold, Cahoun and somebody else from General Motors had lunch at Luchow's. Maiorna came back to Zibold's office with Zibold . Zibold introduced him to his superior Someone, and he didn't identify whom, explained to Zibold's superior what it was that Frank wanted -- at least, that's what my notes say -- introductions to these distributors from Europe so that he could get cars from Europe for the United States, and that Zibold asked for permission or something like that from his boss to give Maiorana letters to introduce Maiorana to the Spanish distributors so the

Spanish distributors would sell cars to him to bring to the United States.

That is precisely the deceptive scheme --

MR. PERSON: It wasn't --

THE COURT: I agree with Mr. Person on that point. I am going to deny the motion to strike.

MR. KLEINBARD: In other words, you are allowing some of Zibold's testimony to come in and not the remainder. That is I guess the bottom line of your ruling.

THE COURT: According to Maiorana these were events that occurred. He took certain steps, He met with Zibold, he was given some letters and he went to Spain. Those are the bare-bone, naked facts.

MR. KLEINBARD: I suppose the rest becomes argument, your Honor.

THE COURT: The test of the testimony which I am letting in it seems to me is necessary to give really Maiorana's side of the events, and I think I am excluding any alleged admissions made by Zibold and I am excluding the statements by Zibold about the procedure.

It doesn't leave the record in a very satisfactory state, but that is the nature of the beast. Zibold is dead. So who will fill in the gaps? If there are gaps it is just inevitable. Maybe the thing should never have been brought up. There are these gaps. Anyway, we have to do the best we can.

MR. KLEINBARD: All right.

THE COURT: Let's go. Let's bring in the jury.

MR. PERSON: One other point, your Honor. I want to cover the various dealers that are not defendants that had activities of refusing to give cars.

THE COURT: Isn't that the subject we broached yesterday?

MR. PERSON: Yes. I wanted to have the jury see what Nabcor had gone through before the Belcher incident.

THE COURT: You are no ready. You still have Buffalo. I don't mean to put off --

MR. PERSON: Buffalo, I can't put on much more now with this witness because he had very limited contacts with Buffalo.

MR. KLEINBARD: I think Mr. Person is correct.

THE COURT: So you are ready for him to go to Belcher?

MR. PERSON: Right.

MR. KLEINBARD: And he has, it seems to me, any number of incidents on the basis of which he can go to Belcher without getting us involved in --

THE COURT: Yes, but the thing is from Mr. Person's side of the case he wants to go to this jury with the maximum amount of evidence and it isn't up to me or the defense counsel to say, well, he can go to the jury with only five instances if 30 instances are relevant.

MR. KLEINBARD: Your Honor, the problem there, I think we have to weigh the possibility that some of this evidence may be relevant against its considerable cumulative prejudicial effect to the defendants. It is hearsay, admittedly, and --

THE COURT: Let me turn to this. What is the nature of the evidence?

MR. PERSON: That various dealers,

GM dealers, had agreed to sell cars to Nabcor, had accepted orders, and had in most cases delivered cars. Subsequently the dealers refused to give Nabcor any more cars, usually cars on order, and Nabcor went from dealer to dealer trying to maintain sources of supply, which was causing Nabcor extreme amounts of damages, and the result of that was that Frank Maiorana, after he came back from Spain, shortly thereafter went to see Mr. Belcher.

THE COURT: When was he in Spain?

MR. PERSON: I think it was November.

THE COURT: The trouble is, Mr. Person, I have always recognized the potential relevance of that, but the trouble is there is another potential, and that is a potential for just a massive amount of inaccuracy, imprecision, unless it is handled in some proper way.

MR. PERSON: It doesn't take long for each dealer.

THE COURT: That's the trouble. It could be dealt with quickly and in an extremely misleading way, not that you would intend that, but the effect might be that.

Let me ask you this: Give me just one name out of the 30 that you would use.

MR. PERSON: Luby Chevrolet.

THE COURT: All right, Luby.

Did Mr. Frank Maiorana, did this witness personally deal with Luby?

MR. PERSON: I will only deal with persons that this witness had dealt with, your Honor. I am not going to hsve him do anything other than testify to his transactions. I don't propose to have him go through other transactions.

THE COURT: Which were handled by some other Nabcor --

MR. PERSON: Just his own direct contacts.

THE COURT: Okay. The trouble is have you really investigated what were the reasons why these dealers refused, have you gone into this in any kind of depth?

MR. PERSON: In each case I have gone over it and I have set forth what the witnesses told me in the book.

THE COURT: Let's take this witness, Mr. Maiorana. Did he deal with someone at Luby?

MR. PERSON: May I get my book, your Honor? I have it all spelled out there.

THE COURT: Yes.

MR. PERSON: On March 17, 1966 Mr. Maiorana spoke by telephone with Fred Abrams, who was a sales manager of Luby, and Abrams agreed to sell a minimum of 200 Chevrolets to Nabcor at $25 over dealer invoice and $25 less 1 per cent. That, by the way, just for your information, means $50 less 1 per cent.

Frank Maiorana sent a letter to Abrams on the same day, and I had an exhibit, my document No. 20015. I have a conversion schedule, which I have handed out to everyone.

From June 30, 1966 to February 6, 1967 Nabcor bought 14 cars from Luby.

On 10/7/66 -- it's irrelevant. I may not go into that.

During early 1967 Alvarez stopped dealing with Nabcor. He told Frank Maiorana that Mr. Luby --

THE COURT: Who is Alvarez?

MR. PERSON: Alvarez was the fleet sales manager of Luby Chevrolet. Alvarez told

Frank Maiorana that Mr. Luby cut Nabcor off because dealers were complaining and he was ordered by the factory not to sell Nabcor cars.

Now, that's hearsay because Luby is not a defendant.

Alvarez also said he was told that GM was shutting Nabcor off all over.

Frank Maiorana then spoke with sales manager Abrams, who said that the factory had called him and said not to sell cars to Nabcor.

Then we have a subsequent contact with Chester Luby, during May of 1967, three months after Nabcor purchased its last car from Luby. Luby answered a Wall Street Journal ad of Nabcor, inquired about it, and his letter is an exhibit. Frank Maiorana telephoned Luby at his office shortly after receipt of the letter and Luby said that this, referring to Nabcor, was that bootlegging outfit. Luby said he used to sell cars to Nabcor until GM shut Nabcor down. GM won't let Nabcor get any cars and the franchised dealers won't let Nabcor compete with them.

Then after commencement of the 1969 Buffalo grand jury investigation Luby sold three cars to Nabcor from June 8, 1970 to July 2, 1970.

THE COURT: Have you talked to Abrams or Alvarez or both of them?

MR. PERSON: No, I haven't, your Honor.

THE COURT: Okay. Have you?

MR. KLEINBARD: I have spoken to some of the dealers. I don't remember all of them by heart.

Yes, Mr. Silverman says I have.

THE COURT: We have a very serious problem here. If that happened you have a case. If it didn't you don't have a case.

I am speaking too broadly now, but it is just about that much of a difference. If indeed General Motors did tell Luby in the person of Abrams and Alvarez or one of them what is represented by those statements, then you are certainly approaching having a case, and if you can multiply those instances, that is your case, Mr. Person.

The problem is that I have already ruled I wouldn't let those things be established by hearsay. Second, I am now beginning to realize the extreme awkwardness of having Mr. Frank Maiorana get on the stand and tell half the conversation.

Now, I think we have to figure out some better way. We come back sonstantly to the fact that the people with the knowledge are the people at the dealer. In other words, if General Motors came and pressured Abrams and Alvarez, then they are the witnesses to tell about it.

As far as I am concerned, I am just throwing out some maybes, some possibilities, but just as an attempt to get some practical way to handle it, I am suggesting the possibility of simply working in -- I mean, bring these people down and see what they say.

It's awfully awkward. Everything about this thing is awkward, because you haven't even interviewed them, nor have you taken their depositions, and these are extremely important people. So we are in the position of having discovery conducted here. But may be the lesser of the evils, if you want to put it that way, and I don't quite mean that, but maybe better than what we have been groping at so far is to see what can be done with a few instances of this, see how it pans out.

I hate to be in that position. I would much rather know what they testified to in a deposition.

hp1

2B

MR. PERSON: There is a practical problem. I have always been dubious that a dealer is going to admit that GM did it. I think it's difficult to envision --

THE COURT: But there is the role of discovery, Mr. Person. If you have 30 instances of this I would be surprised if this really happened if you couldn't get direct evidence. I don't believe you would fail in that if it really happened.

MR. PERSON: It did happen. There is no question at all.

THE COURT: That's what you say and that is what we have had Mr. Maiorana say.

MR. PERSON: I think there is plenty of evidence of that.

THE COURT: Let's not get into that. That's the ultimate conclusion. If it's just your say so that it happened we can fold up the courtroom, we don't have to try a case. But it isn't all that simple, and it's not going to be done through the testimony of Frank Maiorana.

What I am suggesting, and I haven't heard from Paul, Weiss, I am suggesting I am willing to be as flexible as possible to get the facts out here,

hp2

because if you have a case you should be able to make it and if General Motors is liable you ought to recover from them, but there are fair, proper ways to make your case and we are not doing it so far.

I am willing to do just about anything within reason and I am willing to interrupt Mr. Maiorana's testimony. If he gets to a point and he says,"I had dealings with so-and-so," I am willing to interrupt his testimony and have those guys get on. I don't know whether that is a good idea, but at least I am willing to entertain it. Or I am willing to have you, if you want to, take some depositions at night or on weekends. I don't care.

This is really kind of an absurdity, what we had yesterday. We had Mr. Maiorana testifying to his half of the conversation. What is a jury supposed to get out of that?

MR. PERSON: We have instances where GM employees had said that we are not going to be able to get cars, that GM employees would stop us from getting cars.

THE COURT: Said it to whom?

MR. PERSON: To witnesses, Anthony Maiorana and Frank Maiorana, Don Bolling.

hp3

THE COURT: I tell you, you have to get somebody, in order to succeed in your case, you have to get somebody in this courtroom besides those plaintiffs. If you dont I don't know what we are going -- I think it's going to be a very awkward trial and I don't think it's going to end up very advantageous to you or anybody else and there is an awful big possibility of a Court of Appeals panel throwing up their hands and sending it back. I just don't think we are in good shape.

MR. KLLINBARD: Your Honor, in the first place, I just wanted to address myself to the hypothetical, the Luby hypothetical, and I think your Honor has the picture, but basically the problem is that Mr. Luby or any other dealer's willingness or non-willingness to sell to Nabcor is explicable on any number of grounds.

THE COURT: Listen, I know that. I know that without being told.

MR. KLEINBARD: All we have is this hearsay.

THE COURT: Yes, but that doesn't --

MR. KLEINBARD: Now you refer to the possibility of Mr. Maiorana going out and taking -- I am

hp4

sorry -- Mr. Person going out and taking some depositions.

THE COURT: I am really not. It's late for discovery. But I am just saying that certainly there is the subpoena power, you can subpoena witnesses to come to the trial.

Now, you are in a bind because you don't know what they would testify to and certainly you are taking a great risk. I recognize that. But the question is what other way do you have.

If I allow Mr. Maiorana to give testimony about 30 transactions when he is not permitted to tell what the other guy said, I think that is going to be probably one of the worst presentations that anybody has ever figured out to make in a Federal courthouse. To me it was so awkward yesterday, you know.

2

You are doing your best to comply with my rulings and I very much appreciate that. You know, you are saying, "You give your side of the conversation." I think you have to, because if you give the otherside you have thrown out what we worked for.

But you have to see this, Mr. Person, from the standpoint of the jury. It's very awkward and not very intelligible. From the standpoint of General

Motors the burden of proof is almost shifted to them in every single instance to come forward with explanations, and I don't think that's very fair. Gosh, Maiorana may be quoting a dead man. Why should General Motors have to go around the country and bring in the details on 30 instances? I don't think it's their burden. I think it's your burden, and I think you ought to bring in -- if you want to prove that there was conspiratorial activity between General Motors and Luby prove it.

MR. PERSON: We have testimony with GM personnel and we have the fleet certificate program that we complained about to GM, which we can testify we were required to have.

THE COURT: I am not --

MR. PERSON: That's an important part. There are two heads here.

THE COURT: Let's focus. We are now grappling with the proposal to put on evidence about some 30 or so refusals to deal which you say Mr. Maiorana knows about personally, where he dealt with the dealers, and you have given me a for instance in the form of Luby.

That's the problem we are dealing with,

hp6

right?

MR. PERSON: Yes.

THE COURT: I am just saying that I think this is a very important part of your case and if it occurred that General Motors was around pressuring 30 dealers or any substantial part of the 30 dealers, then you have -- it goes without saying -- you have gone pretty far or maybe all the way in proving your case. So this is vital.

I don't want your case to be defeated, although it isn't my business, although I would regret seeing it defeated because of procedural problems. Do you understand what I am saying, do you understand my problem?

MR. PERSON: I see the problem. I think we have a prima facie case and I think that we are entitled to inferences from what has happened to Nabcor, particularly because of this fleet certificate problem.

THE COURT: Now, look, Mr. Person, I understand your problem.

MR. PERSON: I am willing to try --

THE COURT: If I were in your position I would be very, very concerned about calling automobile dealers to the stand before this jury without having either interviewed them or taken their deposition. Believe me, I would be concerned. So if you don't wish to do that, you know, that is a perfectly sound decision and I can't demand that you do it under any circumstances.

But I am telling you that I have very, very serious reservations about allowing Mr. Maiorana to go through 30 dealers and give the kind of testimony that was given yesterday, where he says -- you know, we know what it was -- "I approached them, we talked, they agreed to sell cars and they were happy to sell cars," and then he comes later where he would want to testify that the guy said, "I can't sell you cars now because General Motors is shutting you off," and I cannot under my ruling permit Mr. Maiorana to testify to that, so either he can't testify or else he testifies to his side of the conversation. Either way it's a botch as far as intelligibility.

Second of all, it raises enough of a problem that General Motors has almost got to come forward with the details, and sofar when they have come forward with the details the details have put the thing in a completely different perspective from what Mr. Maiorana did.

All in all -- I am just repeating myself for the seventeenth time -- in the approach that you took yesterday on those instances we did go into and that you are suggesting now we go further with I see very severe problems as far intelligibility and I see some very substantial unfairness to General Motors in allowing you to come on with this what you call a prima facie case and just cast all the burden on them to come forward with the details.

3

I think that the crucial question is did the dealers not sell. Well, Mr. Maiorana can testify to that. He can certainly say, "I didn't get the cars we ordered." But the real crucial question is why and what lay in the background of the refusal by the dealer. That is the crucial question, and for you to be able to go forward with what you call a prima facie case and not introduce one lick of admissible evidence on this crucial subject is something of a bother, where you have never taken -- as far as I can tell, you have never taken a single deposition of any person with firsthand knowledge on this subject, at least among the dealers, and that's the way you are going forward on the trial.

hp9

I am not saying that critically of you. It's just I have a problem.

3A

gp1

MR. KLEINBARD: I have one other problem which, it seems to me, yesterday's testimony illustrated very much, and that is when Mr. Maiorana is allowed to give his half of the conversation --

THE COURT: I know what you are going to say.

MR. KLEINBARD: He frequently embroiders into his half of the conversation something he has heard from a dealer representative.

THE COURT: It is not necessarily "embroider." He may actually quote somebody. It is very damaging, however.

MR. KLEINBARD: The net effect, the bottom line, is that he is, in effect, getting in both sides of the story on the theory that he is talking about one side of the story. I don't know how to stop that.

THE COURT: There is no way to stop it. It is unfortunate.

MR. KLEINBARD: Except there is no basis for him telling any of these conversations unless he is intending to do it for that purpose.

THE COURT: I agree with you and it reinforces my view that this is a very unfortunate way to proceed.

gp2

I think maybe both sides have to forget strategy. As far as I am concerned, I do not care whether you win or General Motors wins. I want to decently conduct the trial, and I want the facts out. I know I have a limited role. I am not a congressional committee investigating the thing, but I don't want to spend weeks here at this trial in a lot of shadow-boxing. I have other things to do. I have other cases where the people are ready to come in with evidence.

I think both sides better rely, to some extent, on objectivity and get witnesses in here with first-hand knowledge.

If General Motors is liable, they might as well recognize it. If there was hanky-panky going on with these dealers, it is not going to help them to have it covered up. They ought to recognize it and come out.

As far as you are concerned, if it didn't go on and Frank Maiorana is cooking up a fabrication here, it is not going to help anyone to have that perpetuated. Let's get it out.

I think you ought to subpoena some dealers and get them in here.

gp3

MR. PERSON: Can they be considered hostile witnesses?

THE COURT: The concept has no meaning to me. I have never understood what it means. All I know is you have a right to subpoena them. You will be examining them under the circumstances that exist. I am not very technical on that. If they display hostility and so forth, I would think you would be in a position to virtually cross-examine them, in any event.

MR. PERSON: I can think of two right offhand that would be enlightening.

THE COURT: Who are they?

MR. PERSON: Marty Motors and Ruckle Pontiac.

THE COURT: Are they within subpoena range?

MR. PERSON: Yes. They are in the Yonkers area.

Earl Stewart, Bob Dillon. They are the people --

THE COURT: Marty Motors is in Yonkers?

MR. PERSON: Yes. They handle Cadillacs and Oldsmobiles.

THE COURT: Who at Marty Motors?

MR. PERSON: John Martabono.

THE COURT: When did the transaction with Marty Motors occur? Did they precede the Belcher thing?

MR. KLEINBARD: They are later on.

MR. PERSON: They refused to deliver. It was during January or February of 1967. That was after the Belcher thing.

THE COURT: The refusal to deal was after Belcher?

MR. PERSON: Yes.

THE COURT: What about Ruckle? Is Ruckle where Stewart works?

MR. PERSON: Yes.

THE COURT: Ruckle are the people that sent those orders back in early 1967?

MR. PERSON: Yes.

THE COURT: Subpoena the people from Ruckle.

MR. PERSON: I will do that.

THE COURT: Subpoena those people.

I will say this, Mr. Person: I think the path we started on yesterday was to let you put in through Maiorana -- the method that you have used I am going to refer to,in shorthand, as Maiorana's side of the dealings. That technique was used yesterday in connection with two or three dealer situations.

gp

I think the path we started was that in connection with the handful of dealer situations that you specifically referred to in your opening statement, at least up to the time of the Belcher interview, you could go into that in that way, and you did so.

It was not, from my viewpoint, actually satisfactory, but at least there were not 30 of them. There were two or three or four. Anyway, that is done.

As of now I am going to say, and subject to revision if it is appropriate, that I won't let you use that method on just an unlimited number, particularly I am referring to the whole 30. I won't allow it for reasons I have tried to describe here.

I understand from you that you that you will try to subpoena the people from Ruckle and at least we will see what happens from that.

MR. PERSON: Also Rohrer Chevrolet.

2 THE COURT: Where is that?

MR. PERSON: Camden. It is within 100 miles.

THE COURT: Get your people out serving subpoenas on those people now.

What I think you better do -- and this may interfere a little with the chronology, but I don't think so -- the jury would have to put things together ultimately. Why don't you have Mr. Maiorana go on and talk. Is he ready to go ahead with the Belcher thing?

MR. PERSON: Can I put on a limited number of dealers on a one-sided basis? The problem is --

MR. KLEINBARD: We have been at this for six and a half years. For us to sit here now --

THE COURT: No argument. I will say no. I feel very strongly how unsatisfactory this is.

You see, you feel that the interview with Belcher won't have any context. Well, I don't agree with you. I think the interview with Belcher will have a great deal of meaning. You had your opening statement. You told the jury what to expect. You told them there was the incident in Buffalo. It just happens that Frank Maiorana -- maybe in your calling of witnesesses it would have been better to have had Strimply and Bolling going first. I don't think so. It is going to work out all right, but I don't want you to go into those. That's the whole purport of what I have been saying this morning. I don't want you to go into those one-sided agreements of any of those

gp

30 instances pending seeing what we could do when these subpoenaed dealers come in.

You go ahead with Belcher and get your people serving those subpoenas and get them in as far as they can.

MR. PERSON: They will be served today.

Would it be too much to indicate the day after tomorrow?

THE COURT: You have to do the best you can.

MR. PERSON: That is for the day of appearance. What would be the best day?

THE COURT: That's up to you. I don't care. I just want to make it clear, and I don't want to go over this again, that for the present, and at least until we hear some samples of what the dealers say, I will not permit you to introduce evidence about any of those 30 refusals to deal, using that technique of Maiorana just telling his side. You will have to go forward with the other elements of Maiorana's testimony of which there are plenty.

MR. PERSON: It is an important part of the case. We will continue as it is right now.

THE COURT: I know it is important. It would be important to me, and that's what I have been saying to you all morning. But it is a question of the technique for proving it. That's all important.

I think the thing to do -- we are one hour and ten minutes late with this jury.

MR. KLEINBARD: I am sorry to hold you up, your Honor. I want to say, for the record, this:

We have had many conferences on who was going to testify here. We were given a witness list. We are prepared on the basis of that witness list. Whereas I understand Mr. Person's difficultties, I submit, your Honor, that I object to his wearing that witness list at this particular time. I understand your Honor's problem, but I want to be on the record as registering an objection to this particular testimony.

THE COURT: I do not think there is a happy solution to where we are now, but maybe, at least, what we are now doing will get out some facts. That's more important than anything at this point.

MR. KAPLAN: I would like to elaborate to one extent: We, in reliance on their brief that Mr. Person filed, and in reliance on your Honor's ruling which we don't have to go over again, we discussed it the last time that Stewart and Dillon came up, and we made a deliberate decision as to who we would examine before trial. We deliberately didn't talk to large numbers of dealers that we are concerned with here. If this is going to mushroom beyond the one or two we have discussed here this morning, it puts us in the position of having proceeded on the premise for six years that none would testify. It is a premise that was repeatedly reinforced by Mr. Person and the Court, and we are in an impossible position.

THE COURT: You have not interviewed Mr. Stewart?

MR. KAPLAN: I am not saying that. I said if it goes beyond the one or two we have discussed here today -- we have interviewed Mr. Stewart and the people at Rohrer.

THE COURT: We can well understand that, but I am probably too optimistic; I have some optimism left that maybe some things will be illustrated by examples.

I get your problem, but I have to break this logjam in some way, and we will take it one step at a time. I think it will be illustrative to see what comes out of the testimony of two or three.

MR. KLEINBARD: Then we will reconvene after that?

THE COURT: I think we have to. This is an impossible way to proceed now.

3 MR. KLEINBARD: I understand that, and I agree with you, your Honor. The only problem is if we are going to proceed broadside, we would have to qsk for a continuance.

MR. KAPLAN: Can we know who Mr. Person is going to subpoena at Rohrer?

MR. PERSON: McIntyre is dead.

MR. KAPLAN: That's the key man.

MR. PERSON: It would be Lovell, if he is there, and Rohrer himself.

THE COURT: We can discuss this frequently as we need to, but right now you are proposing to subpoena people at Ruckle, namely, Dillon and Stewart?

MR. PERSON: And Grimm. There may be a combination. At least two out of the three. Earl Stewart and Dillon are two primary people. Grimm is the third.

THE COURT: Let's give you the maximum leeway we can at this point.

You are saying you may call Grimm, Stewart, Dillon, or any one of them?

gp

MR. PERSON: Yes.

THE COURT: That's at Ruckle. At Rohrer, let's have the names.

MR. PERSON: Madden, Gill Lovell, Mr. Rohrer -- I don't know his name -- and I think there was a comptroller, and I don't know what his name is right now.

THE COURT: Who were the people --

MR. KAPLAN: Mostly Mr. McIntyre, who is dead.

MR. PERSON: I don't think we had any dealings personally with Mr. Rohrer.

THE COURT: You have given us the list of the maximum number.

Mr. Person, in fairness, you keep Paul, Weiss advised of your plans. I am not going to permit an expansion of that list as to these dealers. But if you are planning to drop this or drop any of those people, let us know.

MR. PERSON: I would not drop them.

THE COURT: Let's go out in open court.

(In open court.)

(Jury in box.)

FRANK MAIORANA, resumed.

THE COURT: Ladies and gentlemen, we apologize again for keeping you, but we had some important matters about some legal points and procedural points to go over.

If you recall, yesterday Mr. Maiorana testified about some conversations he had with a man by the name of Zibold. At the commencement of that Mr. Kleinbard, for General Motors, attempted to have a side bar conference to make a motion or an objection and I refused to hear any discussion at that point.

We have since discussed the matter at considerable length, which Mr. Kleinbard raised, and I am now in the unfortunateposition of having to grant the motion to strike the testimony which has been given, because Mr. Kleinbard's position was correct as far as the rules of evidence.

Without going into all the reasons for this, I am going to tell you that I am granting the motion to strike this much of the testimony, and in order to have it meaningful I will have to review with you the testimony I am striking. But all I can say to you is that the utility of a motion to strike, we cannot turn the clock back to 3.30 yesterday afternoon: we cannot entirely erase the event from your memory: the juries have to perform difficult jobs, and I am going to ask you to do this:

When you are considering the evidence and tallying up the evidence in favor of the plaintiffs or in favor of the defendants, you cannot consider this piece of evidence one way or the other. It is stricken from the record because of the rules of evidence. The lawyers will not be permitted to refer to it again, and so forth.

You will recall Mr. Maiorana testified that he talked to Zibold in the Summer of 1967 and Zibold told him, according to Mr. Maiorana, "I know that dealers are shutting you off all over the place. The manufacturers are tracing the serial numbers to sources of supply. I don't think you can get any cars in New York."

That testimony is stricken. You are not to consider it when you are weighing the evidence which has been adduced.

I think that that is all I need to announce to the jury at this point.

You may go ahead.

MR. KAPLAN: If your Honor please, there was another portion. There was a conversation at

Luchow's wherein Mr. Maiorana testified about having talked with Mr. Zibold about the overseas orders, and also the conversation that he started to get into before the jury retired at the end of the day, also about the overseas orders.

THE COURT: I will not strike any more.

Mr. Person, you may continue.

very limitedly where the BADA obtained its information and I want --

THE COURT: Read that then.

MR. PERSON: This is interrogatory 3: "Identify and describe any investigation by you of Nabcor, any other plaintiffs, Multi-Make Auto Sales, Donald Bolling, Gary Kuhaneck, or any other Nabcor franchisee."

MR. KLEINBARD: I have the same objection. I assume you are about to give an instruction as far as General Motors is concerned.

THE COURT: What we have here, it's information about the association and the dealers, and also there is nothing specifically connecting it with General Motors. At least as I understand it those answers do not at this juncture refer to General Motors and you can't consider it against them unless General Motors is logically connected up with this in the evidence.

MR. PERSON: "NFDA contacted the Automobile Association of Greater Philadelphia concerning Nabcor and as a result of said contact received from said Philadelphia association a memorandum dated 1966 and headed 'Nabcor,' which memorandum was a basis for the report contained in the association's Bulletin No. 659.

"It is believed that the association contacted the Buffalo office of the New York State Motor Vehicle Bureau by telephone and as a result of said contact thereafter received from said Buffalo Motor Vehicle Bureau office a copy of the memorandum dated July 18, 1967 from James N. Reddin to A. Montiglio.

"Question: Explain how you decided to write the report on Nabcor and its franchisees and who participated in the decision to write the report.

"Answer: Bulletin 659, which contained reference to Nabcor, which reference has been described in plaintiffs' interrogatories as the 'report,' was prepared in the ordinary course of business of the association by its executive secretary who decided upon and prepared said bulletion. The aforedescribed executive secretary is Miss Marjorie M. Baker, who resides at 171 Lynwood Avenue, Buffalo, New York."

Interrogatory 4E: "Identify each

person to whom the bulletin was sent and the dates.

"Answer: It is believed that on or about September 29, 1967 the bulletin was sent to the members and associate members of the association listed on the attached association membership roster dated April 30, 1967 and to the persons listed on the attached additional mailing list."

The roster includes each of the four Buffalo automobile dealer defendants and includes a substantial list of other dealers as well, which you may examine or we may refer to from time to time.

The additional mailing list also includes people who are not automobile dealers, and Automotive News, an industry publication, is listed on it as well as the Greater New York, Long Island and Westchester Automobile Dealers Association, a Mr. Peter Gordon.

The log of plaintiff Nabcor, Exhibit 450, shows that on September 25, 1967 a Chevrolet was ordered from Rohrer Chevrolet and that this car was delivered to plaintiff Strimple, General Auto Sales & Leasing in Buffalo, on December 12, 1967.

Also the log shows that on the same date, September 25, 1967, another Chevrolet was ordered from Rohrer Chevrolet in Camden, New Jersey, and that this car was delivered also in Buffalo on November 17, 1967, to a Nabcor broker, Auto Livery, and a customer, Mr. W. Pemberton.

Then there is a third car, also a Chevrolet --

MR. KAPLAN: Mr. Person, before you go on, I reluctantly have to object to the last statement because the log shows no such thing. It shows that a car was ordered on September 25th and the only indication here is the word "Cancelled" crossed out and there is no reference whatsoever to Rohrer Chevrolet in connection with that order.

MR. PERSON: We can explain the circumstances of that car.

THE COURT: Please. You are just now trying to give to the jury what the log shows.

MR. PERSON: Correct.

THE COURT: You stick strictly to what the log shows.

You had a first car -- and I am not sure what Mr. Kaplan is objecting to -- you mentioned a first car order September 25, 1967, a Chevrolet ordered from Rohrer Chevrolet in Camden, New Jersey, and you said the log showed it was delivered to Strimple in Buffalo December 12, 1967.

Is there anything wrong with that?

MR. KAPLAN: No question about that.

THE COURT: Then you said there was a second car ordered the same day from Rohrer.

MR. PERSON: Delivered a month earlier.

THE COURT: Delivered November 17, 1967.

Are you saying that is inaccurate, Mr. Kaplan?

MR. KAPLAN: He attributed it to Rohrer. There is no entry with respect to Rohrer whatsoever with respect to that car.

There is a note that says 11/17/67 in a column marked "Delivered," but there are also two places where it says "Cancelled October 17, 1967."

THE COURT: Is there a third car?

MR. PERSON: There is a third car. That car, incidentally, was rebought and delivered back to Rohrer It was delivered up to Buffalo. It reached Buffalo physically.

THE COURT: It is too confusing to have you try to summarize on the second car. We will have to have testimony.

MR. PERSON: Okay. The other car was ordered October 18, 1967, delivered Buffalo --

THE COURT: Ordered from whom?

MR. PERSON: Rohrer Chevrolet, delivered November 17, 1967, ordered by broker Owens in Lockport, New York.

THE COURT: When was it delivered?

MR. PERSON: November 17, 1967.

THE COURT: And it was delivered to whom?

MR. PERSON: Mr. Owens or customer Joseph Czochara.

THE COURT: And Owens was in Lockport?

MR. PERSON: He is in Lockport, American Auto Brokers.

THE COURT: All right.

BY MR. PERSON:

Q You testified that you came back from Spain in November, 1967, is that correct?

A No. I went to Spain in November.

Q When did you come back?

A I believe the date was December of 1967.

Q Shortly after that did you communicate with General Motors in any way?

A Yes.

Q Could you state who you communicated with?

A I communicated with the assistant to the chairman of the board, Mr. Belcher.

Q How did you communicate with him?

A I called the office of the chairman of the board and I asked to speak to Mr. Roche, who was the chairman of the board, and after going through either a receptionist or a secretary four pages.

THE COURT: In other words, there was a detailed report transmitted through the channels that you talked about about what somebody conceived of as Nabcor's method of operation, right?

MR. PERSON: Correct.

THE COURT: All right. I don't think we h-ve to have all that read, really.

MR. PERSON: Exhibit 396.

(Mr. Person read from Plaintiff's Exhibit 396 in evidence.)

MR. PERSON: On Exhibit 130, with respect to a purchase by Nabcor of an Oldsmobile on July 25, 1967, from Al's Community Olds.

(Mr. Person read from Plaintiffs' Exhibit 130 in evidence.)

MR. KAPLAN: Maybe that ought to be explained a little bit more broadly so that it's intelligible. I don't understand how the jury will know what it was.

MR. PERSON: General Motors had a fleet program by which automobile dealers were paid a so-called rebate of a certain amount per vehicle if the vehicle that was sold was sold by the franchise dealer to a customer who was described in the General

Motors plan and Al's Community Olds made application for such --

THE COURT: What document is this?

MR. PERSON: This is document No. 130.

THE COURT: What is the date of that document?

MR. PERSON: The date is unintelligible, if it exists, but it has to be shortly after July 25, 1967, within 60 days, by procedure of General Motors.

THE COURT: All right. What does it say?

MR. PERSON: It's just an application for a fleet allowance.

I would like to have a side bar conference, your Honor, to further make this intelligible.

THE COURT: Is this necessary?

MR. PERSON: It isn't really if we can stipulate that Nabcor never qualified for the fleet rebate, that no sales to Nabcor ever qualified for a fleet rebate.

MR. KAPLAN: Why don't we just tell the jury now what this program was.

THE COURT: All right.

MR. KAPLAN: General Motors in the model years 1967 through 1970, but not for present purposes in the periods before or after those years --

THE COURT: Wait a minute. We will assume what Mr. Kaplan is saying now is stipulated unless Mr. Person corrects him. I think what Mr. Person said a minute ago is in the same category.

MR. KAPLAN: Of course.

THE COURT: In other words, they are trying to give you really some facts which aren't in contest aboutprocedures.

Okay, Mr. Kaplan.

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MR. KAPLAN: General Motors, during these years, had --

THE COURT: For what years?

MR. KAPLAN: 1967 through 1970. That refers to the model of the automobile, not the calendar year.

For those model years they had in each of the four automobile divisions, except Cadillac, a plan which among a great many other complicated provisions, provided that if a dealer sold an automobile to somebody called a qualified fleet user, the dealer was eligible to receive from General Motors a payment of $50 for each car sold to that kind of company.
A qualified fleet user, in general terms, was a leasing company, a company that rented cars on a daily basis, such as Hertz, or a company that used a large number of cars in its own business, such as the Telephone Company or Con Ed.

In the year 1967, the model year, the fleet user had to have bought 20 or more cars in the preceding year for purchasers to qualify for this $50 payment. In all the subsequent years it was 10 cars.

THE COURT: What year was the 20?

MR. KAPLAN: The 20 was in 1967, and the

procedure that the dealer, having sold an automobile to such a customer, or claiming he had sold an automobile to such a customer, filled out a form, such as Plaintiffs' Exhibit 130, which I will show you here, which listed the serial number of the car and the person to whom he sold it, and asked General Motors to pay him the $50 for each one of the cars.

On Plaintiffs' Exhibit 130 there is one entry requesting the $50 payment on one Oldsmobile sold to Nabcor Leasing Company.

I think that's all we need at the moment.

If you have any amendments --

MR. PERSON: Would it be advisable to summarize the fleet certificate requirements at this time?

THE COURT: Sure.

MR. PERSON: Would you like to interrupt?

MR. KAPLAN: General Motors --

THE COURT: You talked about something called a qualified fleet user, Mr. Kaplan.

MR. KAPLAN: I did, your Honor.

THE COURT: The idea being if a dealer sells to a qualified fleet user, then on that car the dealer gets a $50 payment. So let's keep those words in line:

qualified fleet userlike Hertz or New York Telephone Company, or something like that. They would buy from a dealer as described.

Let's talk about the fleet certificate.

MR. KAPLAN: General Motors has for many years, at least as early as 1962, issued something called a fleet user certificate. I have three copies of one for 1968, and if I may, your Honor, I will pass it amongst the jury. I had not expected we would do that this morning.

THE COURT: I think we better get it marked.

MR. KAPLAN: It is Defendants' Exhibit GGG.

THE COURT: Is it in evidence?

MR. KAPLAN: No.

MR. PERSON: I have no objection.

THE COURT: This is an example of a fleet user form?

MR. KAPLAN: Yes.

THE COURT: It will be received.

xx (Defendants' Exhibit GGG received in evidence.)

MR. KAPLAN: If I can summarize what the fleet user certificate was, it was, first of all, not issued by any of the automobile divisions of General Motors. It was issued instead by the fleet and government sales section, which was located in Detroit and to which, I believe, there is no dispute, did not have any direct selling responsibility. They were what is known as a staff entity. They analyzed the market for sales to fleets, the kinds of customers I described a moment ago.

This certifacte was available to qualified fleet users, the same term we had before, but here defined a slightly different way: qualified fleet users who purchased annually a minimum of 20 or more new motor vehicles, cars and trucks, any and all makes for use in their business, one who got one of these fleet user certificates received by virtue of five things:

First of all, it was issued --

THE COURT: The requirement of an annual purchase of 20 cars, was that at some point changed to a requirement of 10?

MR. KAPLAN: No, sir.

With respect to the fleet user certificate as distinguished from the plans under which the $50 allowance was paid, the numbers always remained 20.

It was 20 years early in 1962 and it has continued in that vein to today.

2 Among the things which a holder of a fleet user certificate was eligible for are the following:

First of all, he was eligible to receive for each automobile that he operated in his fleet an identification card. General Motors had, and still has, during the life of the fleet certificate program, a program called Parts Wholesale Compensation. The details of it are not very important. I will summarize it as briefly as I possibly can.

General Motors made available to dealers who sold parts to certain kinds of people a discount below that which they would make available on parts to dealers used in fixing cars in the ordinary course of their own business.

The dealer in selling to someone whose purchases qualified for that was free to pass that discount on or not as he saw fit. Someone who had a fleet user certificate was ewntitled to say to the dealer, "My purchases of parts qualify you for the extra discount from General Motors and I would like you to give me that discount." The dealer was free to do so or not. But in any event, the dealer received identification cards which he gave to the fellow who had a fleet certificate and if that fellow who came in with his car to have it fixed had a card to show to the dealer and would show it to the dealer he was entitled to a discount on certain parts.

Another thing which a holder of a fleet certificate received was that the General Motors Corporation made the facilities of General Motors Training Centers, which for the most part trained mechanics, available to that person. Thus, if a company such as Hertz or Avis had a fleet user certificate and wanted to send its mechanics to General Motors Training Center to train, General Motors would do that.

Someone with a fleet user certificate also received on request repair manuals and service bulletins with respect to General Motors vehicles.

There is one paragraph of the certificate which I will read in its entirety and it was true throughout the period concerned with here. The paragraph reads as follows:

"It is understood in issuing this certificate that General Motors Corporation and its car and truck divisions are not responsible for the users' purchases which are made from unauthorized dealers of such vehicles, the specific purpose of the certificate being to establish a relationship with the user for various services and encourage user to purchase new motor vehicles of General Motors make from authorized dealers.

Of course on the defendants' case you will hear quite a lot of about this.

THE COURT: Let's stick to what is stipulated.

MR. PERSON: I would like to go into one further stipulation on this and I think you would stipulate that it is true, that the dealers were free to give a discount on parts to anyone with or without a fleet certificate.

MR. KAPLAN: Of course.

THE COURT: Thank you both very much.

MR. PERSON: Exhibit 406 in evidence appears to be a work sheet based upon this application by Al's Community Olds for the fleet rebate. There are notations on this work sheet. There are two people mentioned on the application for the fleet rebate. One is Automotive Rentals, Inc. and the other is Nabcor Leasing Company, which is intended to refer to Nabcor. I think we can stipulate to that.

MR. KAPLAN: Yes, but that it was a leasing company.

THE COURT: The name appears. Let's go on.

MR. PERSON: With respect to Automotive Rentals, there is on this work sheet a reference to purchase order dated March 3, 1967, indicating the Borden Company as the lessee of the vehicle bought by Automotive Rentals.

Insofar as Nabcor was concerned, there

is an indication saying Nabcor is not listed in the Polk books for 1966 or 1967, which I think we should stipulate to at this time to clarify things.

When you hear any reference to the R. L. Polk registration books or R. L. Polk books or Polk list, this refers to a list compiled by a company in Chicago, I believe, R. L. Polk & Company, who obtains the most recent automobile registrations from most if not all of the 50 states as these registrations are being filed in the Motor Vehicle Bureaus of those states. It compiles them in such a way and publishes the compilations that it results in a list of persons who have registered cars in their own name with the number of vehicles which each such person has registered over the past period of time.

Is that a fair statement?

MR. KAPLAN: That's my understanding, your Honor.

MR. PERSON: The reference then was that Nabcor is not listed in the Polk books for 1966 or 1967.

THE COURT: I think this comes so

much clearer when we get into testimony.

MR. PERSON: I'm trying to do it chronologically, your Honor. I would like to develop it chronologically if at all possible. We have an event with Mr. Speece coming up --

THE COURT: Let's get through. You have not got a witness; you have a document which is a little difficult to decipher.

Ask a witness who knows about it. It's not the easiest thing to handle if I were in the jury box. Let's get on with something else.

MR. PERSON: One other item and then I can pass on to it. I might as well finish.

Under the Polk registrations it is shown on this exhibit that the Borden Company was found to be in the Polk books, whereas for Nabcor nothing was found.

THE COURT: Because Nabcor didn't have any cars registered in its name.

MR. PERSON: That's correct.

Then the names of the persons who purchased these Nabcor vehicles -- the Nabcor vehicle is listed on this sheet and then there is a reference to a W. C. Brennan, New Jersey Motor Vehicle Division, Trenton, New Jersey. Nabcor, Inc. is described by Mr. Brennan as strictly an outfit that buys cars through all makes of dealers and resells them and operates a string of gas stations as well as being an unfranchised new-car dealer. New Jersey will not accept Nabcor's assignment of a manufacturer's statement of origin or the transfer of title to a purchaser. To Brennan's knowledge, Nabcor has no leasing operation.

I have an Exhibit 501. This has been marked for identification.

Is there any objection?

MR. KAPLAN: No objection.

(Plaintiffs' Exhibit 501 was received in evidence.)

xx BY MR. PERSON:

Q I show you this Exhibit. Do you know a Rohrer Chevrolet?

A Yes.

Q Did Nabcor enter into any agreement with Rohrer Chevrolet for the purchase of automobiles?

A Yes.

Q Can you tell approximately what date this occurred?

A According to the letter it was September 6, 1967.

Q Does that sound right to you?

A Yes. It was in 1967.

MR. PERSON: I have an Exhibit 498 for identification. I offer it in evidence.

THE COURT: Any objection?

MR. KAPLAN: We do, at least without a foundation.

THE COURT: May I see it?

(Pause.)

THE COURT: I don't think there is a foundation at this time. I will sustain the objection.

Q Mr. Maiorana, were you aware of fleet rebates? Do you know what a fleet rebate is?

A Yes.

Q Going back to September 6, 1967, do you know what that is?

A Yes.

Q What was your understanding of the rebate?

A The dealer got $50 from General Motors on each automobile that he sold on a fleet basis.

Q Did Nabcor have any policy with respect to the fleet regate of General Motors?

A We didn't get the fleet rebate, nor did we accept it, or expect it. These fleet rebates were to be paid to the companies that were purchasing these cars that were listed in the manual of fleet companies, of which we were not a part.

THE COURT: Nabcor did not expect fleet rebates, is that right?

THE WITNESS: That's right.

MR. KAPLAN: I move to strike simply because the testimony about General Motors' fleet rebate program, the witness' characterz-ation, is not consistent with the stipulation. It is not consistent with the documents that have been stipulated to.

MR. PERSON: To show his understanding at that time, whatever his understanding was.

THE COURT: I don't know the relevance of his understanding. The point is --

MR. KAPLAN: There is no dispute

as to what the fleet rebates were and who was eligible and who got paid.

THE COURT: As I understand it, he testified that the fleet rebate involved the payment of $50 if somebody bought on a fleet basis. He testified that Nabcor did not expect or accept fleet rebates and then he went on, which he was not really asked to testify about, as to who did get fleet rebates and the circumstances, and the latter I will strike.

Next question.

MR. PERSON: One last item before we are up to the meeting, your Honor.

This is Exhibit 247 in evidence, a memornadum from a Mr. Courtney, assistant manager of fleet sales department for the Chevrolet zone in Philadelphia, dated December 12, 1967, and it is a memorandum to file.

THE COURT: What's the date of that?

MR. PERSON: December 12, 1967.

This is on only one or two days before the meeting with Mr. Belcher.

THE COURT: It's in evidence?

floor."

He says, "Fine. Come on up" -- I think it was the 24th floor -- "and we will go over this."

I got on the elevator, wewnt to the 24th floo4. There was a receptionist there. I gave her my name, I was here to see Mr. Belcher. They sent someone out who took me to his office, directed me to his office.

THE COURT: Keep your voice up a little bit, can you, please?

THE WITNESS: Okay.

Q Did you meet with Mr. Belcher at this time?

A Yes.

Q What did you say to him and what did he say to you?

A Well, I introduced myself as Frank Maiorana, president of National Auto Brokers Corporation. I explained to him the nature of my business, that we were in a business of selling new automobiles of all makes and all models to the general public through a system of automobile brokers, we bought our cars on a fleet basis, like

Hertz and Avis or PH&H, through large dealers with large fleet departments who were willing to sell to us, I said, "But as a result of this we started to expand our operations, it was getting successful, we are having a serious problem with our Buffalo distributor. I have just gotten word from him that your road men, your Buffalo zone and your road men, are directing their dealers or threatening their dealers with cancellation if they sell cars to Nabcor."

I said, "One of the people is Bob English, one of the road men, who has stated this. They have sent out a bulletin, the Buffalo Automobile Dealers Association has sent out a bulletin advising the dealers not to cooperate in any way with our distributor out there or any Nabcor broker," and I gave him a copy of the bulletin.

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He looked it over. He said, "Look," he said, "Mr. Maiorana, I am aware that these things happen." He said, "You know, there are a lot of overzealous young fellows that we take in, young fellows fresh out of college. They are indoctrinated with the GM system and the policy, you know, what GM does is right, and they go into these dealerships as road men and sometimes they see things which they feel shouldn't be done and they can become threatening."

He says, "You must realize that this is corporate headquarters." He says, "We have worldwide interests here." He said, "We have manufacturing plants all over the world and we handle Detroit Diesel, which is a subsidiary, GM Bus, and GMAC. This is the corporate headquarters." He said, "The automobile business is just a part of this and they have control over that." He said, "I know that this happens and I don't know how to control it."

I told him, I said, "Now, Mr. Belcher, I also have a business and I have employees and whatever my employees do I am responsible for by law and whatever your employees do you are responsible for.

According to the law, the Supreme Court handed down a ruling that General Motors was not supposed to interfere with the sale or new automobiles by their dealers to any individual or company who was selling these cars to independent sellers of new cars, discounters like ourselves," I said, "and we are now in the midst of this, and if you say, well, it's the automobile division, then someone should control this automobile division and advise them that they shouldn't do this."

I said, "They sent out this bulletin, they have destroyed all of our sources of supply out there," I said, "and as we go into more outlying areas dealers ask for our fleet certificate number and we tell them we don't have a fleet certificate number and they are of the opinion that it's necessary to have a fleet certificate number in order to buy cars on a fleet basis," and I said, "We are finding it difficult to get new sources of supply and as we get them they are being destroyed through this interference by the zone out there."

THE COURT: You drop your voice. Did you say "up there"?

THE WITNESS: Up there. In Buffalo is

what I meant.

THE COURT: Why don't you keep your voice up so the jury and the reporter hear your entire answer. Would you do that?

THE WITNESS: I will try,your Honor.

THE COURT: So we don't have misunderstandings as to what you have said. Go ahead.

THE WITNESS: I am sorry. Where did I stop?

THE COURT: Sources were destroyed up there.

A (Continuing) I said, "This is a problem that is being created."

He says, "Well, what can we do about it?"

I said, "Well, it's a problem that's being created by your people, and as I stated before, you know, I am responsible for my people and you are responsible for your people and there has to be some way that you can stop it. Maybe you should send a letter to all of your dealers all over the country, you know, advising them that they are free to sell to anyone that they choose, including independents who will be reselling these automobiles, and give me a copy of that letter. Then that could possibly help me, if I could convince these people that through that copy and the fact that they have received a copy from General Motors itself that they are allowed and cannot be stopped from selling us cars, that might help."

He says, "Well, I don't know if I could do that," he said, "but you say that they are asking for a fleet number or a fleet certificate, maybe if you had a fleet certificate, would that help?"

I said, "Yes, yes, because a lot of the dealers feel that we need a fleet certificate, they ask for a fleet number, and we don't have one, we tell them we don't have one, and they refuse to deal with us, and those that do decide to deal with us then check with the zone and the zone tells them that we are not a -- we don't have a fleet certificate and we are bootlegging cars and that they shouldn't sell cars to us. So if we did have a fleet certificate, yes, it could help us to get sources of supply.

"If that's what you feel might correct the problem, I would be willing to go along with it, and I will go along with it also to the extent that if you feel it was necessary to satisfy your dealers or whatever I will buy a certain amount of cars and go into the rental business and leasing business in a small way, as long as you finance those through GMAC.

"Now, you have a program," I told him, "where you give gas stations a line of credit for 10 cars which they can rent on a daily rental basis." I said, "I would be satisfied to go into that and put them in some of our brokers" -- wehad gas stations that were brokers -- "and put those 10 cars and even expand the system, for that matter, if that would help, you know, to give us a fleet certificate, if you feel that will solve the problem.

"But I reiterate, this is your problem, and if that's the way you want to do it, fine."

He says, "Well, I think -- I will see what I can do, you know, to help you."

And we left on a very cordial basis. He was to go to -- oh. In conjunction with that, he said, "Well, okay, fine." He gave me the name of a Mr. Drury, head of General Motors Acceptance Corporation.

He said, "I am going to contact Mr. Drury and explain this to him and you call him and tell him that I told you to call him, set up a meeting to see if we could set up the financing arrangements, and maybe we can get you a fleet certificate and alleviate this problem."

During the conversation at some point -- I think I missed it -- I did bring to the attention that it was imperative that we act immediately because Dale Strimple had threatened to go to the Justice Department and report this activity against him and I told Dale Strimple to hold off, I myself was in contact with Ray Watts, who was associate general counsel for Senator Wayne Morse, who had been in touch with the Justice Department in Washington, and they were pressing for me to come down and give them some information on what had happened, you know, in my system, and some of the things that had transpired in my getting shut off in New York and in other places.

So I told him that my position was that I didn't want to go into this, I didn't want to go into litigation, all I wanted to do was to be in business. I had a viable system, a legal system, and it was being interfered with, and I called my attorney and I asked him would it be wise to bring this to the attention of the head -- right up to the top of the corporation, just in case they did not know that this was going on, to advise them of this before I went to the Justice Department or before I allowed Dale Strimple to go to the Justice Department.

2A

Q Did you say that to Mr. Belcher?

A Yes, I did.

I told him, I said, "It is inperative that we act immediately to solve this problem before this whole thing blows up. All I want to do is be in business. I don't want a lot of problems created."

He said, "We will get on this. We will see what we can do. We don't want any problems," and so forth.

He gave me Mr. Drury's name, and that I should call him and set up a meeting for the financing and the mechanics for us to get a fleet certificate to solve that problem.

Q Is this all you can remember about your meeting with Mr. Belcher?

A That's all I can remember at this time.

Q When was the next time you had any communication with a GM employee?

A I called Mr. Drury.

Q How long after your meeting with Mr. Belcher?

A I believe it was about a week, maybe less than a week, Mr. Person.

Q Were you dealing with Rohrer Chevrolet at this time?

A Yes.

Q Did you have any orders outstanding with Rohrer Chevrolet?

A Yes. We had some orders and they had been shut off. Rohrer had refused to deliver any more automobiles to us. There were a half-dozen or dozen orders at Rohrer Chevrolet that had been stopped at the Philadelphia zone.

MR. PERSON: I would like to indicate that the log for Nabcor in evidence indicates that the last delivery to Nabcor prior to the meeting with Mr. Belcher was on December 12, 1967. Subsequent to that --

THE COURT: What are you looking at?

MR. PERSON: These are my notes on what the log for Nabcor states. it shows that there were six or seven deliveries from the date of November 2, 1967, through 12/12/67, and this does not include several cars that were located apparently.

THE COURT: I don't understand what you are saying.

MR. PERSON: There were cars that were on order that had been received by Nabcor before Mr. Maiorana had a meeting with Mr. Belcher. The next car that was received by Nabcor was on December 19, 1967, a few days after the meeting with Mr. Belcher.

THE COURT: Can't we use this Exhibit J? This is in evidence. It is so much more handy than the log.

Maybe the jurors would benefit by having copies of these lists of cars bought in the different areas, because it might be a good reference. Maybe we could give the jurors a little portfolio. Why don't you get a little binder and then some of the basic documents, lists and things, have it in the jury's hands so they can refer to them. I certainly think things like Exhibit J would help, and I think there is a similar document for Buffalo, isn't there?

MR. PERSON. Yes. There is one for each.

THE COURT: And New York?

MR. KAPLAN: Yes.

THE COURT: Exhibit J shows, if I am correct, 11 purchases by Nabcor from Rohrer, from November 2, 1967, through December 12, 1967. Does that coincide with what you were saying?

MR. PERSON: Yes. There were other transactions going back to August 8, 1967. That was the first one with Rohrer. There is a total of 12 transactions.

THE COURT: You have introduced this Exhibit J. I think there ought to be as complete and correct a list of this kind made up from whatever information is available. I don't have anything for August. Is August a date of an order?

MR. PERSON: That was the first order.

THE COURT: This exhibit reflects delivery dates?

MR. PERSON: 278 is the first Rohrer transaction. It was a 1967 Chevrolet. It was from a preceding model year, at the tail-end of the '67 model year.

THE COURT: Let's hope Exhibit J is complete.

BY MR. PERSON:

Q In your discussion with Mr. Belcher, did you have any discussion of Rohrer Chevrolet?

A Yes. I told him that we had been shut off; that they traced the serial numbers from the Buffalo zone to the Philadelphia zone. We had delivered, I believe it was, two or three cars to the Buffalo area and delivered them to our distributor there who delivered them to his customers, and they traced the serial numbers back to Rohrer Chevrolet and stopped them, the Philadelphia zone stopped them, from selling us any more cars.

2 Q Stopped who?

A Rohrer Chevrolet.

Q This is what you told Mr. Belcher?

A Yes.

Q What did he say to that?

A He said, "I'll have to look to that."

I guess he just avoided the rest of it.

THE COURT: What did he say? What did he say when you specifically mentioned Rohrer?

THE WITNESS: Yes.

THE COURT: What did Mr. Belcher say?

THE WITNESS: I'm trying to put it in the context of my conversation.

THE COURT: Did he reply to you or didn't he on that subject?

THE WITNESS: He said --

Can I wait for a second? I'm trying to -- this is now nine years ago.

Q Take a second or so.

A I'm trying to place it in the context of the problems that I was explaining to him so I could remember what he said.

THE COURT: Take a moment.

(Pause.)

A (Continuing) I think I brought it out to him in the context of the giving to him the BADA bulletin, explaining to him that the road men were telling the dealers, and that Bob English --

Q If you can recall --

A I'm trying to remember how I came up on this series of problems. That they were shutting us off, they traced the serial numbers --

MR. KLEINBARD: There was a question that calls for a direct answer, your Honor.

THE COURT: Did he make a specific answer to the thing about Rohrer? Maybe he didn't. I don't know. Was there a specific answer about Rohrer?

THE WITNESS: Yes, there was.

THE COURT: Or was his statement or his statements those you have already given us?

THE WITNESS: There was a specific statement.

THE COURT: About Rohrer?

THE WITNESS: Yes.

THE COURT: What was that?

THE WITNESS: I can give it to you in substance. I was trying to remember.

In substance, he knows these things happened. It has been the policy of the manufacturers that if a dealer sells a car to a used car dealer generally they get the serial number and trace it back to the selling dealer, and this is the way the division operates. He said, "We'll see what we can do about it," and words to that effect

Then he went in again to this, "We are the corporation and we don't have much control over the automobile division, but I will see what I can do."

I think it was in that portion of our discussion that he made his comments about the cars being stopped at Rohrer Chevrolet. He understood that this does happen. He agreed in principle that this is the way the business works, they do trace back these serial numbers to the selling dealer when there is a problem of this type that arises.

THE COURT: You say that you told him that they traced serial numbers to Rohrer. Did you just say "they" or --

THE WITNESS: The Buffalo zone.

THE COURT: You said the Buffalo zone?

THE WITNESS: Yes. Called the Philadelphia zone and they traced it through the factory; they traced the serial numbers to Rohrer Chevrolet, called the Philadelphia zone and stopped any deliveries from Rohrer Chevrolet to us. At that point we were not able to get any cars from Rohrer Chevrolet. In fact, I recall there was a stationwagon that Rohrer Chevrolet was holding for us through one of our brokers --

Q We will get to that.

THE COURT: You listen to Mr. Person's questions.

Q Was there any discussion about the zone manager in Buffalo, the Chevrolet zone?

A Yes. I told him that the road men --

THE COURT: He asked you about the zone manager.

THE WITNESS: The zone manager was going along with it.

Q One final question about your meeting with Mr. Belcher: Was there any discussion about Mid-Town Chevrolet?

A I told him that I had problems -- now that you bring that question up -- that I had had problems last year right in the New York zone and I had been shut off, and that was in the New York area, and that I had reestablished sources of supply in the Philadelphia area.

THE COURT: I ask all the jurors to keep awake. Some of you are dozing. If you are tempted to doze, stand up, raise your hands.

Let's go off.

A (Continuing) I told him I had reestablished sources of supply in the Philadelphia area and we now had a distributor in Buffalo, and we were trying to establish sources of supply there. I said, "When we were shut off before I tried to keep this thing calm. I was not interested in problems with General Motors. All I wanted to do was to conduct a business," and I did cover the fact that I had had problems the year before, right in the New York area.

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THE COURT: Did you mention specifically Mid-Town or not?

THE WITNESS: I specifically mentioned Mid-Town. I mentioned Ruckle. I mentioned Chief Pontiac, and Grand, and a series of dealers in a sequence of how it happened, Colonial and all of this.

THE COURT: I thought you were asked a while ago to give your entire conversation with Mr. Belcher.

Did you ask him that?

MR. PERSON: I asked him to relate what was stated.

THE COURT: I thought you were asked that.

Did you understand that you were asked to give your entire conversation with Mr. Belcher?

THE WITNESS: Yes, your Honor. It is extremely difficult to remember nine years ago.

THE COURT: Are you saying you don't remember?

THE WITNESS: I do remember as the questions are being asked. It brings back other portions of this conversation. The conversation lasted for a good hour or so.

THE COURT: I think what Mr. Person is asking you about, and you take all the time you need to think, is the entire conversation with Mr. Belcher. You understand that, don't you?

THE WITNESS: Yes.

THE COURT: And if there is anything else at all that was said between you and Mr. Belcher in that talk you tell us, and it is up to you to remember it, and it is not up to any lawyer to lead you.

THE WITNESS: I understand that.

THE COURT: You tell us what you remember. I will give you an opportunity to complete it. Give us exhaustively everything you remember.

A (Pause) Okay.

I brought to his attention the series of shutoffs that I had the previous year.

THE COURT: It is not a matter of bringing it to his attention. What did you say?

THE WITNESS: I mentioned specific names.

THE COURT: What did you say about the specific names? What did you say? I am not interested in a list of copies. I am not interested in a list of names. I am not interested in anything except in words or substance. What did you say?

THE WITNESS: I said that I had had trouble last year. I believe I started that way, that I am not interested in having problems with General Motors, and in order to emphasize that point I brought out the fact that last year I had problems here in New York. We had a source of supply and that source of supply was cut off. We hired Don Allen as an employee of ours who was national fleet manager for -- Bud Morrison, rather -- fleet manager for Don Allen Chevrolet, and when it was taken over by Mid-Town they shut us off immediately.

I told him what I was told, that Mid-Town was not in the business of making a profit but holding the prices up. They were not going to be competing with the outlying dealers but holding prices up so that the outlying dealers could make a profit.

The fact that some of our dealers had applied for a fleet certificate for us and we were turned down, and then there was a series of shutoffs: Mid-Town Chevrolet, Luby Chevrolet shut us off, Chief Pontiac shut us off, A.C. Chevrolet, and I mentioned a series of shutoffs.

THE COURT: Did you say there was a series of shutoffs? Tell us how you said it.

BY MR. PERSON:

Q Don't summarize. State what you said to the extent you remember it.

THE COURT: If you summarized it, then okay. It is not for you to summarize in this courtroom. Tell us what was said if you can remember.

THE WITNESS: I told him of the discussion with Englert and his boss, that they could not sell us cars.

I told him of the Ruckle Pontiac situation where Bob Dillon, Earl Stewart told me, had at his home over the weekend a high official of the Pontiac zone who told him not to sell cars to Nabcor any more, and that was the reason that they refused to sell any more cars to Nabcor. They had to follow orders.

I told him about Chief Pontiac agreeing to sell us cars and then calling the zone and being told we didn't have a fleet certificate and that we were bootlegging cars and they should not sell to us. We were not able to buy from them.

I told him about Grand -- not Grand, but Bates Pontiac.

I told him about Colonial Cadillac, all the Cadillacs that we had ordered that we never got.

THE COURT: Look, Mr. Maiorana, I don't want it misunderstood that I am intervening to get you to testify in any way. That goes without saying. My intervention is not for that purpose. But on the other hand, it is not proper. For if you are going to testify in court that you said something about a certain topic, you can't just give us the topic. In other words, you have to try to remember what was said. We will take as long as necessary to let you testify as to your version of what happened.

I want it understood by both you and the jury I don't know what was said, nor does the jury know what was said. We were not there. You cannot simply raise topics. If you are going to say something was said you are going to have to tell us what was said.

THE WITNESS: I'm trying to.

THE COURT: If you talked about Chief Pontiac, you can't just leave it go with a topic. You have to tell us. And then you have to be committed to that being your story and that will be a question of credibility whether you did say that, but I don't want you to just leave it hanging that there were some names mentioned. You have to tell us everything you remember and you are saying to this jury everything you are willing to testify was said, the whole story, according to your version.

THE WITNESS: Can I explain to you what I'm trying to do?

THE COURT: No. Don't explain things. There is one question and I am not -- you are not being asked about highlights. You are being asked about what was being said. Nobody asked you about highlights.

THE WITNESS: There are some things I can remember verbatim and some things I can't after nine years, your Honor. I must give it in substance. I'm a human being and I'm not a computer that I can recall verbatim what was said in an hour or an hour-and-a-half conversation. There are certian more important topics that are burned into my memory.

THE COURT: Let's not have any of that.

THE WITNESS: That's about what I remember at this point. If there are any othe questions that refresh my memory, I can give more testimony.

BY MR. PERSON:

Q I am not supposed to lead you into subjects. If you feel you have said everything you can remember we will go on.

A That's all except it was left, he gave me Mr. Drury's number at GMAC, who was the head of GMAC, and told me that he would call Mr. Drury and tell him of the problem and that I would be calling him to set up an appointment to see if we could resolve this problem, and that's the way we left.

Q You said your next communication with a GM employee was with Mr. Drury. Who called whom?

A I called Mr. Drury.

Q What did you say to each other?

A Well, we set up a meeting and I went to his office. It was on the same day. I went to his office. I asked him whether Mr. Belcher had called him and told him of the problem we were having. I told him who I was.

Q Excuse me. Once again, when you say

problem you were having, state what it is that you said to him rather than trying to summarize. State what you had described to him, to the extent you can recall.

A I described to him that we were in the business of selling cars through a national brokerage system. I had gone to see Mr. Belcher about a problem in the Buffalo area that General Motors personnel was creating for us and it was Mr. Belcher's suggestion that a fleet certificate would help and I agreed it would, and I was willing to cooperate by going into a small leasing operation on one of their leasing plans as long as they would finance the operation, and that's what I was there for.

He said Mr. Belcher had called him and told him something about it. But he said he cannot handle it through this office but he would have to refer it to Philadelphia, which is where our main office was, in Jenkintown.

He gave me the name of Mr. Speece and Mr. DiSimone who I should get in contact with.

MR. PERSON: I have an exhibit here, 554 for identification. I offer it in evidence.

MR. KLEINBARD: I object to it at this time. There is no foundation to this. There are two names on a piece of paper.

THE COURT: Let me see it, please.

(Pause.)

THE COURT: Is this something Mr. Maiorana can identify?

MR. PERSON: I think so.

BY MR. PERSON:

Q Is that your handwriting on the exhibit, 554?

A This is not my handwriting. I believe this is my brother Anthony's handwriting.

Q Could you continue then with your statement of what you said to each other?

A Mr. Drury?

Q Yes.

A That about concluded the conversation. He gave me the name of Speece and DiSimone in the Philadelphia area, their phone numbers. I was to call them. I was to call and make arrangements and if there was any problem, that I was to tell them to call him.

Q Is that the end of your conversation?

A That in substance was what the conversation was.

Q When did this occur?

A Several days after my discussion with Mr. Belcher.

Q Could you be specific with a number, if you can?

A About a week or so. That's as specific as I can be, Mr. Person.

Q When was the next communication you had with any GM employee?

A I called Mr. Speece and I told him that I had talked with Mr. Drury in connection with getting a line for a small leasing operation, rental and leasing operation, and he told me that I should call him and DiSimone to set it up because we were in the Philadelphia area.

Q What was Mr. Speece's function or position with GM?

A He was the zone manager of Chevrolet, the Philadelphia zone.

Q Who was Mr. Drury employed by?

A General Motors Acceptance Corporation.

He was the head of General Motors Acceptance Corporation,according to Mr. Belcher.

Q What is the next communication you had with a GM employee?

A Well, when I called Mr. Speece, it was as a result of the conversation with Mr. Speece that I had my next communication, if you want me to continue and tell you what exactly transpired in that conversation.

Q Who was it with?

A With Mr. Speece. I had not finished.

I told him Mr. Drury told me to call him in connection with this getting the fleet certificate, and he said, after I introduced myself, he said, "I'm familiar with your operation. You are bootlegging cars and I don't know if we can sell you cars for a fleet operation or lease. You are going to have to -- as far as I'm concerned, I could not approve anything like that; you will have to talk to DiSimone about that." He referred me to DiSimone.

I called DiSimone.

Q Do you know who Mr. DiSimone was?

A DiSimone, I think he said he was in

charge of fleet for the zone and I would have to talk to him about it.

Q Did you?

A Yes. I called Mr. DiSimone.

Q When?

A Almost immediately thereafter. Maybe the same day or the day after, I don't recall. It was pretty quick. I was in a hurry to get things moving.

Q What did you discuss?

A I again told him of my discussion with Mr. Drury and what we were trying to set up, and I called Mr. Speece. Mr. Speece said that he could not approve it. I told him that we were selling automobiles. "Mr. Speece seemed to have objected to that and referred me to you." He wanted to set up a meeting."

He said, "Well, we're not in the business of selling cars to people who are going to resell them. Evidently you are going to put up a leasing company, and you want a fleet certificate to buy automobiles. I don't know whether I can go along with that," but he wanted to set up a meeting with me.

I said, "I don't have time to have meetings over this." I said it was my understanding -- I told him I had talked to Mr. Belcher; there was a problem in Buffalo. I explained briefly what the problem was in Buffalo: that they had cut off our supply in Philadelphia by tracing the serial numbers back. I went to Belcher and Belcher sent me to Drury and we came up with this arrangement for a fleet certificate.

I told him, I said, "As far as I'm concerned, I'm only calling you at Mr. Drury's suggestion to resolve the problem. It's your problem, it's General Motors' problem. To have a meeting, I see no point in it unless you feel there is something that can be done about it."

He said, "Let me call Mr. Drury and I'll get back to you."

That was the last conversation I had with Mr. DiSimone.

Q Who was the next GM employee you spoke with?

A I believe I called Mr. Belcher and told him -- it seemed as if things were not going along -- he had indicated that I was going to get some help on this thing, to see if we could get it resolved.

He said, "I'll see what I can do, if I can speed things up." And the next thing -- the next person I spoke to was a man by the name of Mr. Karney. He had left a card at my office in the General Motors Building.

MR. PERSON: I have Exhibit 566.

A The card stated, if I can recall, "I'm sorry I missed you. See you after the holiday."

MR. KLEINBARD: There is no question pending.

THE COURT: Are you offering 556?

MR. KLEINBARD: I have no objection to the front of the card. I have an objection to the back of the card.

(Pause.)

THE COURT: I will admit the front of the card but not the back.

556 is received.

(Plaintiffs' Exhibit 556 was received in evidence.)

xx

Q When did you last see this card, Mr. Maiorana, the card you described?

A no the best of my recollection, when I picked it up at my office in the General Motors Building. That was in January of 1968, the early days of January or the latter part of 1967.

MR. PERSON: The card states at the top in handwriting, signed by Mr. Karney, "I will contact you on January 2, 1968. Happy New Year."

Q Could you continue now, Mr. Maiorana.

A I called him possibly the 3rd or 4th of January, after I got this card, and he came to my office for a meeting, supposedly to square this thing away. He said we would have to go over and see some other people and we could talk on the way over.

So I left with him, left my office, and we went across the street. Diagonally on 57th and Broadway there was the General Motors Building, and diagonally there was another building where there was a Cadillac showroom and over that there were additional General Motors offices. The building was used for other offices. We went in that building.

We went to an office where there were two other individuals. We sat down. I introduced myself and Mr. Karney introduced himself. We went on -- I went on to describe what had happened.

Q Could you state what you said, please?

A That I had seen Mr. Belcher about a problem that we were having in Buffalo.

If I could backtrack for a moment, on the way over Mr. Karney asked me some questions about the nature of this problem --

Q State the questions he asked, if you can remember.

Q He asked me, Mr. Belcher asked him to come over and there was a serious problem. I told him about the Buffalo problem, our distributor was being shut off, there was a bulletin put out by the Buffalo Auto Dealers Association advising the dealers not to cooperate with our brokers, that the GM personnel there were telling the dealers they would cancel any dealer who would give cars to Nabcor or any of its brokers, and that was right from the Buffalo zone.

The Buffalo zone was aware of it.

He asked me who it was, and I told him in one specific instance it was a Chevrolet dealer. I told him it was a man by the name of Bob English, and I told him about the incident in the presence of our broker and the dealer he threatened the dealer, or any other dealer, with cancellation if they supplied our brokers with any cars. As a result of that that was why we were having this meeting.

I went to Mr. Belcher rather than create a problem. Dale Strimple was getting ready to go to the Justice Department. I went to Mr. Belcher and Mr. Belcher suggested a fleet certificate.

I told him he suggested I see Mr. Drury and then I called him up. I told him that didn't seem to be getting anywhere. I didn't go into too much detail on that. "However," I said, "This is the purpose for our meeting, so that you can expedite it." I said, "I think that's why you are here."

At that time we had gone into that building and he said, "We are going to talk to some people."

We went in there and I reiterated some of the problems.

Q You are talking about a meeting among the people --

MR. KLEINBARD: Was this across the street?

THE COURT: He said they crossed the street.

MR. KLEINBARD: All of the conversation that followed has been in the street?

THE COURT: That's what he has testified to.

MR. KLEINBARD: I wanted to make sure.

THE COURT: Let's take a short recess, please.

(Recess.)

THE COURT: Go ahead.

MR. PERSON: Thank you.

BY MR. PERSON:

Q Could you describe the meeting that you had, please, and state who was there one more time.

A There was Mr. Karney, two other gentlemen and myself.

Q What was said at the meeting, please, and be specific.

A I told them -- I told the two individuals and Mr. Karney, who was there and was listening to the conversation, but it was primarily directed to the two individuals, that we were having a problem in Buffalo and that I had gone to Mr. Belcher, explained the problem to him, and he suggested that a fleet certificate may solve that problem, and he sent me to Mr. Drury, and that I was willing to go into even a small fleet company in order to, if it helped them, you know, comply with whatever their rules were --

THE COURT: You mean a leasing company? You said a fleet company.

THE WITNESS: Yes, for the fleet certificate, a leasing or a rental company, your Honor, consistent with my discussion with Mr. Belcher that I was willing to cooperate and I would even go into a small rental and leasing company if GMAC would finance it.

A I explained this to them and that as a result of those meetings we were here, Mr. Karney and I had come down and had brought me here so that we could expedite this thing and what was to be done about it.

So they started to go into a series of questions.

Q Who was that, when you say "they"?

A These two individuals. And if I recall, they were from the Chevrolet Division. It was in the Chevrolet zone. They were associated with the Chevrolet zone, if I recall correctly. I may be mistaken, but this is what I recall.

Anyhow, they went into a series of questions about my system, how it worked.

Q What questions, please, once again, if you can recall.

A Well, let me see if I could give it

to you in some sort of order.

"Well, gee, how does your system work?"

Q And what did you say to that?

A I said that we sell automobiles through a system of brokers who act as purchasing agents for their customers and as a result of an extremely low overhead and in some cases no overhead, if they are operating out of their own homes, acting as brokers and purchasing agents they can save the customer a lot of money. In addition, they handle all makes and models. They act as consultants for their customers. They are providing services, you know, that are not readily available at the dealership because the dealer that's selling Buicks, for instance, is going to sell -- is going to extol the virtues of Buick, even though the customer may be better off buying a Chevrolet or a Ford.

So I said this was basically what our system was. So that we were selling automobiles through this system of automobile brokers.

Now, as a result of the Supreme Court decision, which prevented General Motors or any other manufacturer from interfering with a busi-

business like ours, this is why we were in this business. We now had a problem and the very same type of a problem that General Motors had been cited for by the Supreme Court and I felt that I should bring it to the attention of Genera Motors so that they could do something about it before we got into litigation or whatever.

That was that part of that question.

Then they said, "Well, how about service?" You know, questions like this.

I said, "Well, service, according to your warranties, the implied warranty ofmerchantability, according to the law, is that General Motors is responsible for that automobile, you know, regardless of its express warranty, it is responsible for that automobile, and it is up to General Motors to repair it. But even in its own warranty it states that the car can be repaired in any dealership in the United States or Canada. We are dealers. We are not users of the car. We register the car in the customer's name as a brand new automobile and that customer, according to your warranty, is entitled to five years or 50,000 miles, which occurs first, and if he happens to sell the car to someone else, any unused portion, you know, accrues to the second buyer or, you know, the third buyer, for that matter." I said, "This is what your arranty states and that's what the warranty program is." I says, "But you know that they can get service anywhere."

He said, "Well, that's true."

MR.KLEINBARD: Who is "he," your Honor? We have three people in the room.

THE COURT: Yes. Who said what? You started to say "He" replied in some way. Who is the "he"?

THE WITNESS: I don't recall what I said previous to that. Read it back to me.

(Record read.)

THE COURT: Who is the "he" who said, "Well, that's true"?

THE WITNESS: Of the two individuals there was one that seemed to be superior to the other or one that was subordinate to the other.

MR. PERSON: May I suggest a name

to him, Judge Griesa?

THE COURT: Was it the subordinate or the superior who --

THE WITNESS: The superior that was --

THE COURT: You see if you can refresh his recollection with a name.

Q Does the name Mr. Fogg mean anything to you?

A That sounds like one of the individuals.

Q Do you know which one?

A He was -- I think he was the one that was the spokesman and the other was the subordinate, was more quiet.

Q Let's call the spokesmanMr. Fogg. Whether it is or whether it is not, maybe you can call him Mr. Fogg from now on.

A Okay, fine.

MR. KLEINBARD: Your Honor, I don't think we can have him called that whether he is or whether he isn't.

THE COURT: I understand your point, Mr. Person, but it's got to be the witness' testimony. If it is this witness' memory that there was a Mr. Fogg there and he was speaking he can testify. If it isn't or he is not sure it is another thing.

Why don't you go into this a little more and see what his recollection is.

BY MR. PERSON:

Q Do you have a recollection of whether there was a person at the meeting named Mr. Fogg?

A Yes.

Q Do you recall which of the two previously unnamed persons it would be, it was?

A He was the one that it was my impression was superior to the other individual. Mr. Fogg seemed to be in a higher official position than the other individual.

Q Did Mr. Fogg indicate to you which division of GM he was with?

A Chevrolet is what I recall he was with.

Q If you will proceed then with your description of the meeting and then refer to this superior person.

THE COURT: Refer to the way you remember it. If your memory is that it was Mr. Fogg who said something, say it; if your memory ters.

MR. PERSON: That was no deception.

MR. KLEINBARD: Which again would be his boss' participation in this program.

MR. PERSON: There was no deception at that time, your Honor.

THE COURT: Wait a minute.

MR. KLEINBARD: Also I have difficlty in understanding if Zibold --

THE COURT: I am not clear. What did Mr. Maiorana say that Zibold's boss said?

MR. KAPLAN: The testimony was that Zibold, Cahoun and somebody else from General Motors had lunch at Luchow's. Maiorna came back to Zibold's office with Zibold . Zibold introduced him to his superior. Someone, and he didn't identify whom, explained to Zibold's superior what it was that Frank wanted -- at least, that's what my notes say -- introductions to these distributors from Europe so that he could get cars from Europe for the United States, and that Zibold asked for permission or something like that from his boss to give Maiorana letters to introduce Maiorana to the Spanish distributors so the any parts that he installs on the automobile as a result of any service that he performs on any car," I said, "and there are a lot of dealers that welcome service, and in fact you know that a lot of dealers try to build up their service departments so they could reduce their overhead and reduce the cost, the huge cost of selling a new automobile, so a lot of dealers welcome the opportunity to increase their service income through servicing of new cars, the factory pays for that service."

Anyhow, he asked some more questions, questions relating to why should -- don't you think that the public, you know, would rather deal with a dealer rather than someone that has just an office and they don't have this physical thing, like a facility that would indicate that they are capable of taking care of their cars, and I told him, I said, "Today" -- this was Mr. Fogg -- "Today service can be had anywhere. This is not like some new invention of some piece of machinery that a company in Iowa is making and they are the only ones that know anything about it." I said, "The automobile has been in existence for almost 70 years." I said, "There are a lot of independent garages that could repair a car, there are a lot of gas stations that are repairing automobiles. In fact, it has come down to specialization. There is transmission shops, there is muffler shops, there is all types of repair facialities available to the general public, independent repair facilities, you know, exclusive of the automobile dealer service facilities, which are just as good."

He said, "Well, the automobile is a highly complicated piece of machinery, you know, really requires a dealer to service the car."

I said, "We have no objection to that. Your car is a new car and comes with a new car warranty. We are a dealer. We do not use the car. We don't drive it, we don't register it in our name, we register it immediately in the customer's name, and the customer gets the benefit of that warranty.

"Now, if you elected to allow us to do the servicing we would be only too glad to appoint a series of independent garages and all you would have to do is send your service bulletins.

to them and they would be quite capable of repairing cars, because parts are available and the mechanics are quite capable of performing the work."

In fact, I believe at that time Hertz and Avis was doing their own get-readies with their own mechanics and doing their own repair work. In fact, I think Mr. Kaplan brought it out that they had a school that trained --

MR. KLEINBARD: Did he mention that to Mr. Fogg, your Honor?

THE COURT: Please.

THE WITNESS: I am sorry, your Honor. I went on to an aside, that he had brought that out, that they trained mechanics.

BY MR. PERSON:

Q Just keep with the discussion so that everything is neat.

A Well, there were more questions. I could go on and on. But I saw that this was a fishing expedition, they were just trying to find out --

Q Testify to what was said, please, rather than trying to characterize it. That's always a problem that we have. Just state what you said and state what they said and then we can draw the conclusions if it is possible.

A Well, they asked about sources of supply and, you know, if you had a fleet certificate and if you didn't get one how would you continue to supply your dealers.

I said, "There is 42,000 domestic dealers in the United States and based on the policies of the manufacturers in trying to sell as many cars as they possibly could to these dealers, most dealers have an oversupply of automobiles and we can get cars, they are perfectly willing to sell us those automobiles, you know, as long as there is no interference from the manufacturer."

Then they wanted a list of the dealers who we were dealing with who were supplying us with cars and I said, "Well, I am not going to give you a list of dealers that are supplying me with cars now because I have had the problem already twice." I said, "How will that serve your purpose if I gave you a list of the dealers who are supplying us with cars? I mean, what would that do to help you, you know, get me a fleet certificate and solve a problem that you have now? Would you harass them?"

I said, "As far as I am concerned, I am not interested in a fleet certificate. I don't need it. This is General Motors' problem. They are the ones that are nejoined from interfering with independents or prevengint their dealers from selling cars to independents and this is what they are doing. It's their problem. It's up to them to solve that problem. It was Mr. Belcher's suggestion that a fleet certificatemight solve that problem. I don't care whether I have one or not. Just send a letter out, and this is all I want, advising all of your dealers that they are not prevented from selling me automobiles."

I said, "I see no reason to continue this," and at that point I aborted the meeting and I said, "Mr. Karney, I would like to leave now. I want to get back to Mr. Belcher. I don't see any point in going any further with this." And we left.

Q How many people left the room at that time with you?

A Mr. Karney and I.

Q Just Mr. Karney and you. And how many people remained in the room after the meeting?

A Mr. Fogg and the other individual.

Q And you can recall seeing two people in the room?

A Yes.

Q Where did you go at this moment? Did youisplit or what did you do vis-a-vis Mr. Karney?

A I told him I was going to call -- first of all, I told Mr. Karney, I said, "What's going on here?" I said, "I understand that -- it's my understanding Mr. Belcher sent you down here to expedite this thing and it seems to that we are getting pretty far field from the original purpose of this thing, to get a fleet certificate and alleviate a problem, which is your problem, not mine. I don't care whether I have it or not. All I want is no interference with my sources of supply."

So he sais, "Well, my job is to see whether you would qualify for a fleet certificate and I don't know that until, you know, we go through certain steps."

I says, "Well, I am not interested in going through certain steps." I said, "I been through those steps before and as far as I am concerned" --

MR. KLEINBARD: Excuse me, your Honor. We can't hear the witness.

THE COURT: Yes. Please speak up.

THE WITNESS: I am sorry, your Honor.

A I told him, "I am not interested in going through those steps." I said, "There has been several attempts. As far as I am concerned, I know that I don't quality, I have been told that I don't quality, and I am not going to go through that again. I thought that you were to cut through the red tape and expedite this. This was what Mr. Belcher told me that you were going to do.

"Now you come in here and now you are going to go through this whole process again to get all of the information on my company to see if I qualify."

So this is the way we left. I said, "I am going to call Mr. Belcher and see what happens from there."

Q That was the total of the conversation with Mr. Karney?

A Yes.

MR. KLEINBARD: Could we have the place of that conversation, your Honor?

THE COURT: All right.

Q Could you state --

A Leaving the office and going back to my office. We split up at the General Motors Building. He went up to my office. I don't know where he went.

Q Mr. Karney's card states his office is in the General Motors Building.

MR. PERSON: I have Exhibits 328 and 329 for identification.

THE COURT: Are you offering them?

MR. PERSON: Yes.

MR. KLEINBARD: No objection.

THE COURT: Received.

(Plaintiffs' Exhibits 328 and 329 were received in evidence.)

xx Q I would like to show you 329. It is a request for a General Motors fleet user certificate, dated January 3rd, crossed out, January 4, 1968.

Would you please take a look at that.

A Yes.

Q Did you see this form being filled out during the meeting that you had with Mr. Karney, meeting No. 1 or meeting No. 2, including Mr. Fogg?

A No.

Q You didn't see anybody filling out any form like this?

A No, I have never seen a form like this in my life.

Q Could you look at the questions that are on the form, that is, the date, the name of firm, city and state?

Did anyone in the meeting, either Mr. Karney, Mr. Fogg or the third person, ask you the name of firm or city and state or any of the other questions that are set forth on that form.

If you will read the questions to yourself first, please.

A No.

Q Do you see an indication for the number of vehicles at question No. 8? There is a number of vehicles mentioned on the form. It says 1000.

A 1000.

Q Is that a number that was supplied by you?

A No. The question before it says "Total company-operated motor repair shops" -- oh, I see.

THE COURT: We are not hearing you.

Q Speak up, because they are taking down every word that you are saying.

A No, it has nothing to do --

THE COURT: The question is did you supply to Mr. Karney or anyone at General Motors the figure referred to there.

A No. It asys 1000 cars that we own here.

THE COURT: All right, that is the answer.

A No, I told them we had no vehicles that we owned.

Q Before this litigation had you ever seen a form, request for General Motors fleet certificate?

A I had never seen a form like that.

Q And you never filled out any such form?

A Never.

Q I would like to just show you 328, which is dated Januqry 24th. Is the same thing true about that form?

A It seems like the same type of form.

Q A couple of variations, but essentially the same.

A I have never seen it.

Q After you and Mr. Karney departed what was the next communication that you had with a General Motors employee or GMAC employee, whichever one?

A Mr. Belcher.

Q When was this?

A Oh, I would say it was maybe the next day or so, possibly the next day, or even -- I think it was the next day.

Q And how was --

A I called and I went up to see him.

Q Could you please describe the meet-

State what you said and what he said.

A I went up there and told him that I thought that I was getting the run-around, that my original purpose in coming to him and believing in his sincerity and to try to assist was to eliminate a problem that I saw arising for General Motors, you know, and to a lesser degree for us, but mostly for General Motors, because they were in violation of this injunction that they were on, and I came and brought this to their attention in good faith, and he seemed to be sincere and I believed him, but all I was getting was the run-around, and he suggested a fleet certificate that would -- might alleviate the problem, and I told him, "I am not interested in a fleet certificate. Just send a letter to all of your dealers explaining to them that they can sell cars to Nabcor or any other independent or reseller of cars and give me a copy of that letter. That's all I want."

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He says he couldn't do that. He is sorry that I felt that way, that he was trying his best. I have to realize that Detroit had control over this. This was world operations here in the corporate headquarters, but he would be getting in touch with Detroit, and he would go through them and indicated to me, or implied, that he would go over the heads of these individuals now and go right to Detroit.

MR. KLEINBARD: I object to "implied," your Honor.

THE COURT: Yes.

What did he say?

THE WITNESS: That he was going to go directly to Detroit, your Honor, and I got the impression that these people

THE COURT: ..No, not your impression.

A (Continuing) That he was going to go to the top officials in Detroit to see if he can expedite this, to see if he can alleviate this situation.

So I said, "Okay. When can I call you?"

He said, "Call me in a couple of days."

I called him several times. He said he had called Detroit and they were looking over ways and how they could help alleviate the situation, but he hadn't gotten word back, and I was supposed to call him back in another day or two, give him a little more time, and in a couple of days I called him back again and he hadn't gotten back to Detroit, and I was supposed to call him back again.

I think it was maybe the third or fourth time that I called him, he says, "Well, hold on. I am going to get on the phone to Detroit immediately and see what the answer is."

While I waited on the phone he supposedly went and called Detroit and came back and he told me, he says, "I'm sorry, Mr. Maiorana. I can't help you any further. Detroit has turned you down, and I can't do anything more about it."

Q About what date was that?

A I would say by that time it was the middle of January.

Q Did you have any additional communications other than by mail with Mr. Karney after this meeting with Mr. Belcher?

A Yes. I spoke to Mr. Karney again and asked him what he was doing about the situation or if he could do anything about the situation in conjunction with what Mr. Drury had suggested, maybe getting this small leasing company, and he indicated to me that -- I wouldn't give him the names of our dealers or something. He wanted the names of our dealers, which I wouldn't give him, and if I recall correctly he wrote me a letter.

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Q Before we get to that, did you have a meeting with Mr. Karney after the two meetings on the one day?

A Yes.

Q This was another meeting with Mr. Karney?

A Yes.

Q Did Mr. Karney at any time ever state to you that he knew of Nabcor prior to this?

A No.

MR. PERSON: I offer Plaintiffs' Exhibit 353 and Plaintiffs' Exhibit 356.

MR. KLEINBARD: I have no objection to Plaintiffs' Exhibit 353.

THE COURT: Plaintiffs' Exhibit 353 will be received.

xx

(Plaintiffs' Exhibit 353 received in evidence.)

MR. KLEINBARD: I have no objection to 356 as a letter which purports to be from Mr. Maiorana to Mr. Karney, but I do object to it as to the truth of the statements therein contained. In other words, if it is not offered for the truth of that purpose --

THE COURT: I think it is obvious. This is a letter by Mr. Maiorana to Mr. Karney. If he says he complains about the Buffalo area, it is not evidence in and of itself about what happened in Buffalo. It is simply evidence that this is what Mr. Maiorana said to Mr. Karney. As to what may have happened in Buffalo or New York, or whatever, there has to be competent evidence in this courtroom, testimony in this courtroom, and I am sure you understand that.

Exhibit 356 is received on that basis.

xx (Plaintiffs' Exhibit 356 received in evidence.)

Q I show you Plaintiffs' Exhibit 353 --

THE COURT: What is the date of that?

MR. PERSON: January 31, 1968.

THE COURT: And Exhibit 356?

MR. PERSON: February 7, 1968.

THE COURT: You may proceed.

Q Is that the letter you were referring to as having been received by you from Mr. Karney?

A (Pause) Yes.

Q And Plaintiffs' Exhibit 356, is this a copy of a letter you sent to Mr. Karney?

A (Pause)

THE COURT: It should not take that long. Is it a letter you sent to Mr. Karney?

THE WITNESS: Yes, your Honor, but this was in 1968 and I wanted to make sure that --

I would say yes.

Q I see there are carbon copies indicated to Mr. Belcher, to the president and to the chairman of the board of GM. Did you send copies of this letter to Messrs. Belcher and the president and the chairman of the board of GM?

A Yes.

Q This Exhibit 356 states: Received, New York, February 9, 1968. J.M. Roche.

I show you both exhibits.

I might state that this Exhibit 353 is the letter from Mr. Karney to Mr. Maiorana stating that --

THE COURT: It is almost quicker to read it out loud, if you want to.

MR. PERSON: I will read it.

(Mr. Person read to the jury from Plaintiffs' Exhibit 353 in evidence.)

(Mr. Person read to the jury from Plaintiffs' Exhibit 356 in evidence.)

Q Did you have any discussions with any GM employees about the subject matter of either of these two letters subsequent to your sending the letter to

Mr. Karney?

A Ask that question again.

Q I asked about GM employees. Did you talk with any other General Motors employees?

A I don't recall.

Q Did you speak with any GMAC employees?

A I don't recall. I may have talked to Hank Thomas, who was with GMAC in an effort to continue our efforts to get a small line.

Q What efforts did Nabcor make to obtain financing to acquire automobiles at this time?

A We had contacted Matt Slapp Chevrolet.

2 MR. KLEINBARD: May we have what this witness did. We have several employees. He is answering it in terms of Nabcor.

THE COURT: I don't know if there is a difference.

The question is: Did you personally make any efforts to get financing from GMAC?

THE WITNESS: Yes.

THE COURT: What was that? Whendid it take place?

That's what you are asking about?

MR. PERSON: Yes.

THE COURT: You take it, Mr. Person.

Q Could you state what efforts you on behalf of Nabcor made to obtain financing for automobiles.

First of all, did you make an effort, and the answer is --

A Yes.

Q What was your purpose for this effort?

A To try to get financing under -- or to go into one of the General Motors' fleet plans, one of the 10 or 20 car plans that they had. They had a couple of plans. One was a 10-car plan and one was a 20-car plan.

If I recall correctly, I spoke to a Hank Thomas with GMAC.

Q What was the purpose of acquiring a line of cars through a fleet plan?

A To give to our brokers as rental units so they could rent to the general public; where we could rent through them, those brokers that had gas station operations, and maybe we could expand our business in that way.

Q Did this relate at all to your communications with either Mr. Belcher or Mr. Drury?

MR. KLEINBARD: I object to that.

A This was a continuation of that.

MR. KLEINBARD: We have had the entire conversation with both of those people.

THE COURT: I overrule the objection. You want to get to context? The best way to do it is to say what happened when it happened. If you want to place it by saying it was at the same time as your talks with So-and-So or after --

Let's get what happened and when.

Q Did you communicate with a GM dealer concerning an acquisition of a line of automobiles?

THE COURT: A line of financing?

Q Whom did you communicate with concerning either an acquisition of a line of automobiles or a line of financing?

A Matt Slapp Chevrolet.

Q Whom did you speak to at Matt Slapp?

THE COURT: Where is Matt Slapp?

THE WITNESS: In Philadelphia.

THE COURT: You may proceed.

A I spoke to them subsequently. I believe my brother Anthony initiated the original request. He offered to do business with them on this fleet basis for a leasing line. At that time when General Motors' plans were --

MR. KLEINBARD: He is now testifying as to what his brother Anthony said or did with respect to Matt Slapp.

MR. PERSON: His understanding of what he was applying for.

THE COURT: I think you can just get to the facts.

MR. KLEINBARD: The question was whom did he communicate with.

THE COURT: I understand that Mr. Anthony Maiorana will testify. All this witness can testify to is what he knows he did. The jury will hear other parts of the story from other witnesses. Let's, quickly, have what he did.

Q What did you do, Mr. Maiorana?

A As a result of the communication with Matt Slapp Chevrolet, General Motors Acceptance Corporation required full recourse --

THE COURT: Look, Mr. Maiorana, this is not your fault, but did you personally have any discussions or any transactions with GMAC about this financing?

THE WITNESS: Yes. With Hank Thomas.

THE COURT: You had discussions with Hank

Thomas?

THE WITNESS: Yes.

THE COURT: Did you have any discussions with anybody else at GMAC?

THE WITNESS: That's all. After the Drury situation and all of that I spoke to Hank Thomas.

THE COURT: Was somebody else in your organization active in respect to the possible GMAC financing?

THE WITNESS: Yes.

THE COURT: Who was that?

THE WITNESS: Anthony Maiorana.

THE COURT: I assume that Anthony Maiorana will testify about that.

MR. PERSON: Yes, your Honor.

THE COURT: If there is something particularly within Mr. Frank Maiorana's knowledge, let's have it from him while he is on the stand.

That's with Hank Thomas, right?

THE WITNESS: Yes.

THE COURT: What happened with Hank Thomas?

THE WITNESS: I set up a meeting for him --

THE COURT: For who?

THE WITNESS: For Hank Thomas to come in to our office, or whatever. I believe he met with my brother Anthony or had a discussion over the phone with him. I don't know which. It would be up to him to bring that up.

Q During this time, was Nabcor dealing with Matt Slapp Chevrolet?

A Yes.

Q At what time is this? What month in 1968 are we talking about?

A We are in February, about this time.

Q Do you recall when that Nabcor first started doing business with Matt Slapp Chevrolet?

THE COURT: This is February of 1968?

THE WITNESS: Yes.

THE COURT: The question was: When did you start doing business with Matt Slapp?

A In 1967.

Q And Nabcor was placing orders with Matt Slapp Chevrolet?

A Yes.

Q And was receiving cars from Matt Slapp Chevrolet?

A Yes.

THE COURT: It is a little after 4.30. If the jury can retire I will talk to the lawyers for a

THE COURT: Let's do our best to have a full day tomorrow. I hope we do not have any problems that we have to discuss at the beginning of the day.

I think, to avoid holding the jury at the beginning of the day, I would be glad to do this: If you have a problem that is going to take discussion and we have not anticipated it the night before, somehow get word to my office and we will meet in advance of 10 o'clock. I sometimes have 9.30 appointments, but something can be squeezed in. If we know we are going to have to take up questions we will try to set the conference in advance of 10 o'clock. Of course, you cannot be too rigid.

Is there anything anybody expects to have to cover before 10 o'clock tomorrow morning by way of a problem?

MR. KLEINBARD: It's hard to anticipate what the witness is going to say, your Honor, but if he is going to discuss the Econ and Marcus testimony we will have a problem similar to that which we had with respect to Mr. Zibold.

THE COURT: Refresh my memory about Econ.

MR. KLEINBARD: Mr. Econ is the man who

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responded to the letter of Mr. Stolarski complaining about the Corvette that the plaintiffs claim should have been drop-shipped to the Chevrolet agency in Michigan.

THE COURT: Who testified about the Stolarski bit?

MR. KAPLAN: Frank Maiorana.

THE COURT: Do you have a reference to that?

MR. KAPLAN: It is just after page 500. It starts at 511.

THE COURT: What is the problem, specifically?

MR. KLEINBARD: Mr. Econ's job, which he testified to at page 1047, and again at 1051, was that he dealt with individual owners' complaints and he had no responsibility with dealers. That's made very clear.

THE COURT: Mr. Econ testified he is an employee of the Chevrolet Division.

MR. KLEINBARD: He is on the owner relations staff of the company, of General Motors, and he deals, as I said --

THE COURT: Where is his testimony?

MR. KAPLAN: 1047 to 1051 on this point.

MR. KLEINBARD: 1051 is the crucial testimony, as well as his testimony on 1049.

THE COURT: I get from the testimony at 1046 and 1047 he was an employee of the corporation as distinct from any division, and that it was his job to channel complaints to perhaps Frigidaire, or whoever.

MR. KLEINBARD: And that he did not deal with dealers. That's at page 1051. That's the most important aspect of it from the point of view of this objection.

THE COURT: What is the problem area with him? What's the testimony that you object to?

MR. KLEINBARD: Mr. Maiorana is putting all sorts of things in his mouth as to what a General Motors' dealer had said and the practices of General Motors with respect to the dealers.

THE COURT: "All kinds of things" meaning what?

MR. KLEINBARD: For example, at the middle of page 513 he says the buyer makes arrangement for drop-shipment with another dealer, but General Motors has to approve it, and we had not approved it, so I

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told -- meaning Frank Maiorana -- we have a customer here, and so forth. He then said, referring to Mr. Econ, that he could not do anything about it, that he would refer it to Mr. Marcus.

There is other testimony here. In the preceding page --

THE COURT: How did Mr. Maiorana happen to be talking to Mr. Econ?

MR. KLEINBARD: Stolarski had a communication with him.

MR. PERSON: And gave us his telephone number, your Honor. Mr. Stolarski gave Econ's telephone number. It was probably on the letter that Mr. Stolarski got from Mr. Econ.

THE COURT: Did he get a letter?

MR. PERSON: Yes, but we don't have that letter.

MR. KLEINBARD: We have never seen one either.

THE COURT: You can surmise that this occurred that Stolarski made a complaint and he got to Econ somehow because Econ is in the position of receiving complaints.

MR. KLEINBARD: Right.

THE COURT: Then --

MR. PERSON: He testified that the number was correct.

THE COURT: Then Econ's name was given to Frank Maiorana.

MR. PERSON: With a number.

THE COURT: With a number, and then Frank Maiorana calls him and, again, Econ is someone who receives the complaints, and so the question is: What happened in that conversation if it ever occurred? And the legal question raised by Mr. Kleinbard is whether certain statements are within his employment under the rule.

MR. KLEINBARD: That's right. Basically the statement at page 513 --

THE COURT: Here is the thing. I don't think this is quite the same situation as Zibold because, let's suppose that Mr. Maiorana calls somebody at General Motors who was held out as someone to process complaints; let's accept as credible for the time being the testimony of Mr. Maiorana; let's suppose that the fellow who is processing complaints makes statements to Mr. Maiorana; let's suppose he did, in fact, make those statements to Mr. Maiorana as related at page 513 of the preliminary hearing.

Well, can you say that the fellow who was put in the position by General Motors of handling complaints and talking about complaints to the public, suppose he responds to the complaint and he says, he makes explanations about how drop-shipments are handled, would that be outside of the scope? Isn't he held out by General Motors to discuss the complaints of people with him?

MR. KLEINBARD: He issues and then refers them to a particular department. He doesn't announce company policy.

THE COURT: But Mr. Maiorana's story is that he did.

MR. KLEINBARD: If he did he was going outside of the scope of his authority. He has no authority to do that.

MR. KAPLAN: If I can it out shortly, the burden is upon the plaintiffs to show that what he said, the words Maiorana wishes to put in his mouth, pertain to a matter within the scope of his employment. The only evidence whatsoever on the scope of his employment as it relates to this alleged statement by General Motors regarding drop-shipments, page 513 of the transcript, is the following question and answer from Mr. Econ's testimony:

"Q Did you have anything to do with drop-shipments in connection with your job in 1970?

"A Never."

There is no foundation whatever that this man had --

THE COURT: Where is that testimony?

MR.KAPLAN: 1052.

MR. PERSON: This transaction dealt with that subject matter and he was the one that was receiving it in dealing with it, so if he is going to deny it, and he has, that he made these statements, that's one thing. He was put in that position to handle this. We communicated with him, and certainly --

THE COURT: Where is his testimony?

MR. KAPLAN: 1052.

THE COURT: Hedoes talk to the public.

MR. KLEINBARD: But, your Honor, I am sure you would agree that there are things he cannot say to thepublic which would be binding on General Motors.

THE COURT: That's up to him not to say it.

MR. KLEINBARD: If he goes way beyond the scope of his authority, we cannot be held by it. How

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do we control tens of thousands of employees?

MR. PERSON: Nobody has the authority to commit an illegal act.

THE COURT: He was staff assistant in the order relations department of General Motors. That's on page 1046.

MR. KLEINBARD: He goes on to explain that he doesn't deal with dealers.

THE COURT: He says he communicated with individuals who had written or telephoned General Motors. He occasionally communicated with them on the telephone.

MR. KAPLAN: We don't dispute that. The problem is at 1051 and 1052, where he testified that he had nothing to do with drop-shipments and --

THE COURT: Let's suppose he did not actually have authority to speak on the subject but he had apparent authority because General Motors put him in the position of speaking with complaining people about their complaints. Mr. Maiorana calls and says, "What about a drop-shipment?" He undertakes to respond. He is the guy, if we believe Mr. Frank Maiorana's testimony, that is out there as the spokesman for General Motors on this incident, and this is not a matter of huge corporate policy. It is not a thing that you would expect just couldn't be known by this fellow.

MR. KLEINBARD: It is hard for me to conceive --

THE COURT: Isn't there a concept of apparent authority?

MR. KLEINBARD: Yes, but not as to the practices of General Motors with respect to dealer drop-shipments.

THE COURT: What I am dealing with is this: My understanding of the case law is that there is authority for the proposition that within the problem we are talking about the scope of employment concept can be satisfied by either actual or apparent authority.

Am I right as a matter of law? Just to begin the discussion, am I right or wrong?

MR. KLEINBARD: I think clearly a person put in the position of dealing with the public has certain apparent authority.

THE COURT: Is apparent authority sufficient to comply with that scope of employment thing? As a matter of law, it is.

MR. KAPLAN: We have some doubt about it, your Honor.

THE COURT: I do, too. That's why I raise it. I don't want to be going off on something. I think some of the cases speak of apparent authority. I'm not sure how strong that is. That's why I am raising it.

MR. KAPLAN: There is another point that avoids the question and that is this: As we tried to suggest last night with Mr. Zibold, even if this was something within the scope of his employment, conceivably there has to be some showing that he was competent, that he knew what General Motors' policy was on drop-shipment, and that he knew what the drop-shipments were, and there is no showing. We have Mr. Maiorana's testimony that he called a man at General Motors and the man told him about General Motors' policy on drop-shipments. This was a man who was to refer complaints about Frigidaires and so forth.

(Pause.)

THE COURT: Mr. Person has the burden of showing that this man is competent to talk about the subject.

MR. PERSON: The competency is not from the fact that this was sent to the president's office.

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THE COURT: What was?

MR. PERSON: Mr. Stolarski's letter.

THE COURT: Connect that up.

MR. PERSON: They are talking about a fleet delivery in a letter.

THE COURT: Did that go to Mr. Econ?

MR. PERSON: He came into the picture as a result of this letter. We are going to bring in Mr. Stolarski.

MR. KLEINBARD: He can testify about his conversations with Mr. Econ, which is probably what happened in any event.

MR. PERSON: Mr. Kleinbard, I have been trying to refrain from calling you a liar all the time. You have been calling my client a liar all the time. Why don't we --

MR. KLEINBARD: There is amply evidence today of that.

THE COURT: Let's cool off.

MR. KLEINBARD: I don't think I have to apologize for that.

THE COURT: We have a letter from Stolarski to Cole. Where did this come from?

MR. PERSON: Mr. Stolarski.

THE COURT: These are his notes?

MR. KLEINBARD: I believe he sent a copy to Mr. Maiorana.

THE COURT: Yes, but this document comes from the files of Mr. Stolarski.

MR. PERSON: That's a copy of a letter he sent to Mr. Cole. I presume he has a copy himself.

THE COURT: Where did this particular piece of paper come from?

MR. PERSON: From Nabcor's files.

THE COURT: It does not come from GM's files?

MR. PERSON: Yes.

THE COURT: Do you know whose writing this is?

MR. PERSON: We have some of it identified. Mr. Maiorana wrote on the back.

THE COURT: There are two types of handwriting in the front. There is the blue ink and the pencil on the front. · Whose is what?

MR. PERSON: It is all Mr. Frank Miaorana's writing on the front and the back.

THE COURT: Let me ask you this: What is the purpose of introducing the evidence that Mr. Econ said that GM has to approve drop-shipments?

MR. PERSON: It shows intereference with the dealers, and it shows that --

THE COURT: Take it slowly. I want to get a more complete idea.

At page 513 he said the buyer makes the arrangement for drop-shipment with another dealer, but General Motors has to approve it, and we have not approved it.

That's the essence of what you are complaining about, is it not, Mr. Kleinbard?

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MR. KLEINBARD: Yes, coming through
Mr. Econ's mouth.

THE COURT: As recited by Mr. Maiorana?

MR. KLEINBARD: Yes.

THE COURT: What's the purpose of
showing that? Are you trying to show in fact
that General Motors must approve a drop shipment
and in fact that they had not approved it?

MR. PERSON: We are trying to show
that the customer and Nagcor had made an attempt
to arrange to complete a transaction that had been
agreed to with a franchisee of GM and that General
Motors prevented that transaction from taking place
by virtue of not allowing a drop shipment as a
matter of policy and in fact not permitting it to
occur.

THE COURT: What I'm getting at:
are you trying to show the fact about a general
policy or are you trying to show that there was
a kind of subterfuge here, either a misrepresentation
about the policy or a misuse of the policy
or ulterior motives, namely to prevent this
transaction and hurt Nabcor?

MR. PERSON: I'm showing that it

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definitely was designed to hurt Nabcor, to prevent this transaction from taking place.

THE COURT: You are trying to show that the actions here were expressly for the purpose of hurting Nabcor. You are not merely trying to show just the existence of a general --

MR. PERSON: Both points are included within this offering.

THE COURT: It gets a little sticky. If you are trying to have Mr. Frank Maiorana testify as to something that Mr. Econ said in order to show that General Motors, somebody in General Motors with authority to do this,was trying to use this device to hurt Nabcor, that's sticky. I don't think you contend Mr. Econ was the evil genius here, do you?

MR. PERSON: He was one of the persons involved.

THE COURT: Wait a minute. The thing is, if Mr. Econ is simply saying something -- there is no evidence that he was the perpetrator of anything nor the originator of a policy, no evidence of that. The trouble with your proposition is that you are trying to prove through

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Econ that somebody else at General Motors was doing things in this transaction to hurt the transaction and to hurt Nabcor. The problem is that Econ is not connected with whoever it was that was doing those things --

MR. PERSON: Except through the president's office.

THE COURT: Then call the president.

MR. PERSON: We have tried at times.

THE COURT: I don't imagine he has a memory of this.

MR. PERSON: Who is this person --

MR. KLEINBARD: I am reasonably sure Mr. Cole never saw this letter. It's passed on through people who handle --

MR. PERSON: Nobody has authority at GM.

THE COURT: Mr. Person, at least it seems to me that whoever it was that was deciding about whether to approve drop shipments or whether to hurt Nabcor in its obtaining cars from dealers, if there was such a person or if there was such a group of persons, I think we have got to draw some reasonable inferences, and I would think

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that there is no indication whatever that the person or that group of persons was in the customer relations department of General Motors, the department that Mr. Econ was in.

MR. PERSON: Econ was contacted from within GM rather than without so GM can assign to anybody it wants the matter raised in the letter.

THE COURT: That's not on the record.

MR. PERSON: Take it subject to connection.

THE COURT: I'll not do that. If you want to try to establish that Econ was delegated by somebody to be the spokesman for GM in this, you establish it, and you can call Mr. Maiorana back after it's done and put him on and have him testify about this.

MR. PERSON: I would have to read the record. It may be in the record that he didn't get it from a phone call on the outside.

THE COURT: I'm concerned. I think it's a valid concern where we have a statement being made which you want to make very serious argument from. You want to make not just a kind of innocuous argument that here was proof

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of some general GM policy, you want to try to use this to prove, to have inferences drawn, that GM was conducting itself here in order to hurt Nabcor. If you are going to do that, it seems to me, and you are going to have to prove that through the mouth of Frank Maiorana, you have at least got to get a foundation that this alleged spokesman of GM in the matter comes within this rule.

MR. PERSON: I'll subpoena him.

THE COURT: If you want to show that Econ was delegated the function of a spokesman and he was connected in some valid way, you can do it and you can then call Mr.Maiorana back on the stand after you have laid a foundation. That's the way we'll proceed.

MR. PERSON: So a subpoena duces ecum to get documents that show the policy, since that would be better evidence than what --

THE COURT: As far as the policy about the drop shipment, I would think you would all know that. That's not any mystery.

MR. PERSON: Maybe they can stipulate that the policy is as Mr. Econ stated it.

MR. KAPLAN: We will have to find

out the details. One thing is obvious. If a dealer in New Jersey orders a car from General Motors and asks for delivery in Michigan, General Motors has to do something about it.

THE COURT: Because General Motors has to at least give the delivery -- why don't you check on that and maybe we can simplify it.

MR. KLEINBARD: The Marcus problem is the same problem squarely, your Honor.

THE COURT: There is no evidence that there even was a Marcus.

MR. KLEINBARD: That's why I say it's the same problem. Mr.Maiorana is also putting into Mr. Marcus' mouth --

THE COURT: Who does Mr. Maiorana say Mr. Marcus was?

MR. KLEINBARD: Whoever he is, assuming he exists, the remark that we object to is that he, this person, calls Stolarski and expressed displeasure about his buying a car through Nabcor and then he later on says, "You are not a dealer. We are going to" --

THE COURT: Where are you reading from?

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MR.KLEINBARD: First I was reading from page 518, towards the bottom of the page, the witness being Mr. Maiorana, and he says --

THE COURT: Excuse me. Does Mr. Maiorana indicate who he thought Mr. Marcus was?

MR. KAPLAN: He said Econ passed him on to Mr. Marcus. Econ came in and testified that he never heard of anybody named Marcus.

THE COURT: So he was somebody --

MR. KLEINBARD: Referred to allegedly by Mr. Econ, right.

THE COURT: What did Mr. Marcus say?

MR. KLEINBARD: At the bottom of 518 according to Mr. Maiorana, that he called -- he is supposed to, Mr. Marcus, have called Mr. Stolarski and expressed displeasure or something about his buying a car through Nabcor, and then more seriously on page 521 Mr. Marcus is supposed to have said, line 16, "Well, you are not a dealer. We're going to ship the car to the dealer. General Motors has to approve drop shipments and we are not approving a drop shipment," and so forth.

THE COURT: We have to get a better foundation for who Marcus was and in what capapa8

city --

MR. KLEINBARD: He can't be in any better position than Mr. Econ.

THE COURT: If you can get how Econ came into it maybe we can get a better idea of who this Marcus is or whatever his name.

MR. KLEINBARD: He has similar testimony with respect to his not dealing with dealers.

THE COURT: You will have to defer all of that until you get a better foundation.

Have you gotten your subpoenas out?

MR. PERSON: This evening, your Honor.

THE COURT: You would expect to have them Friday?

MR. PERSON: yes.

THE COURT: Are you sitting this Friday?

MR. PERSON: Yes.

THE COURT: Thank you all.

MR. PERSON: Can General Motors produce these individuals without a subpoena.

MR. KLEINBARD: We don't have any control over the dealers.

MR. PERSON: I meant Messrs. Marcus

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NATIONAL AUTO BROKERS CORP.,
et al.,
Plaintiffs,
vs.
GENERAL MOTOR CORPORATION,
et al.,
Defendants.

70 Civ 5 421A

Before: HON. THOMAS P. GRIESA, D.J.,
and a Jury.

New York, October 28, 1976:
10.15 A.M.

Trial resumed.

- -

(Jury in box.)

FRANK MAIORANA, resumed.

MR.KLEINBARD: Your Honor, may I see you at the side bar?

THE COURT: Yes.

(At the side bar.)

MR. KLEINBARD: I just received this morning this trial subpoena which is I-don't-how-many-pages long. It is, in my judgment, patently an application for discovery. I don't want to take the jury's time now to discuss it. I know you want to get on with the case.

THE COURT: We will have to talk about that.

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MR. PERSON: All of these things are relevant to issues that have arisen.

THE COURT: It has to be handled in some way. We will talk about it later.

MR. KLEINBARD: As to these, I have also been handed all these exhibits. I think it is most misleading for the jury, particularly, to have these things introduced in bulk. Also, frankly, it is very boring. They don't seem to follow it.

As far as I know, almost everyone, if not all of these, will be introduced through appropriate witnesses and should be gone into one at a time.

THE COURT: I think it is a waste of time. The letters that were exchanged between Karney, Maiorana, and were read, those have meaning because they followed the testimony. But so much of this is out of context because there is no witness. I have never seen a trial where this kind of thing was done. There is usually something to put it in perspective. There is a deposition, there is some testimony.

MR. PERSON: There were so many hundreds of people that were involved with documents that the documents tell more of the story rather than the hundreds of people.

THE COURT: I don't think they do.

MR. KLEINBARD: There won't be hundreds.

THE COURT: I think you have to work this out. By the time this case is over these people will be here a long time, and I am quite certain I am not going to dismiss the case at the end of the plaintiffs' case. I don't know. If there was any danger of that right now I would not want to prevent you from putting in your case, but I will consider the possibility of putting these documents in as a witness testifies and, in fact, if an appropriate time comes and General Motors doesn't put it in, I want you to stand up and say, "I want to introduce that particular document," and you can read it at that moment as your exhibit and your document.

MR. PERSON: My strategy, if you can call it that, is that there are time frames that are relevant. In connection with the Belcher incident, there was transmittal of the BADA bulletin from Buffalo to Di Simone and to Detroit in the fleet section. That is right at the time of Buffalo and the Belcher incident, and it is something that --

THE COURT: Did Belcher know about it?

MR. PERSON: This is part of the problem.

He delegated this stuff to Mr. Olson who got Mr. Karney in and then Di Simone was involved. So it came from --

THE COURT: What I am afraid of is you are now having a witness on to testify about what he knows and what he says he knows, what he did with Belcher, what he says Belcher told him, what he did with Speece or Di Simone, Karney, and so forth. Now he is testifying about his knowledge. You put these documents in which refer to other people, Berg, or whatever, Olson --

MR. PERSON: They were all happening at the time of the refusal.

THE COURT: Look, Mr. Person, You read these documents and I guarantee you we will be going over it again in a few days. We are doing double duty on the same subject. I don't think it helps the jury. It does not help me. I just cannot get anything out of it. I have more background than certainly the jury does. It seems to me inevitable in a case that different things have to come in from different witnesses, and jurors are better than you think about when it comes to remembering from one witness to the other and putting things in context, but I think they are not going to be so good when you read the letters. The connections are not there.

I assume General Motors will call Di Simone.

MR. KLEINBARD: Yes, your Honor.

THE COURT: I assume there will be testimony before this trial is over where you can ask about the connections, but I am just saying that I am concerned with the time wasted, confusion arising from putting these documents in when the connecting links are not there. I think it can be misleading to somebody's detriment, maybe yours or maybe General Motors. Let's continue with your testimony. You cannot cover everything at once. You cannot do that. You need witnesses.

MR. PERSON: This concerns the drop-shipment policy of GM, when Mr. Berg was in theoffice as director of the fleet and government sales section during this period.

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THE COURT: What is this about?

MR. PERSON: This describes what happened before 1968, that there were --

THE COURT: What issue are you addressing?

MR. PERSON: The Stolarski incident that's coming up shortly. The policy of General Motors for drop shipments that you can't do it except in 1969 with the approval which is not going to be given except in the best interests of GM.

THE COURT: You are saying --

MR. PERSON: He was right.

MR. KLEINBARD: My objection, No. 1, I don't know what is on the first page of the letter. My contact with General Motors is not here.

THE COURT: Get Berg to testify to it.

MR. KLEINBARD: He will be here. I can ask him about it. Certainly it has nothing to do with Mr. Maiorana.

MR. PERSON: These are policies.

THE COURT: This doesn't address

the issue. The question is not the correctness. They might stipulate the policy, but the question is Maiorana's testimony as to what Econ said, and at the proper moment I don't know what -- I don't know what Mr. Maiorana si going to say that Econ said, if he's going to simply give a bland definition of a policy or he's going to come out with some statement that is very incriminating against General Motors.

The point we left at yesterday was that you had to come up with some connection between Econ and this area of General Motors' activity that puts that within Mr. Econ's scope of employment. I adhere to that ruling. It is not solved. This may lead to a stipulation as to what the policy is, I don't know. But that doesn't mean --

MR. KLEINBARD: You may be quite correct, but --

THE COURT: Let's proceed.

(In open court.)

THE COURT: Proceed.

BY MR. PERSON:

Q Yesterday, Mr. Maiorana, you were testi-

MR. KLEINBARD: I object, your Honor.

THE COURT: Sustained.

Q Did you have any communication --

A I couldn't get the truck.

THE COURT: Couldn't get the truck?

THE WITNESS: Couldn't get the truck.

A I called Joe Bonfield.

Q Did you, subsequent to that telephone call -- was that telephone call concerning any orders?

A Yes.

Q Did you communicate with anyone from GM subsequent to that?

A Yes. I communicated with a Jack Douglas of the New York zone office, Chevrolet's zone office.

Q How long after your conversation with Mr. Bonfield concerning the truck?

A Almost immediately. Mr. Bonfield told me that --

Q No, please, we have to think ahead now and keep it limited to just what you had said.

You had called Mr. Douglas, is that correct?

A Yes.

Q What did you and Mr. Douglas state? You can give both sides of this conversation.

THE COURT: This was on the telephone?

THE WITNESS: Yes.

THE COURT: Okay.

A I asked Mr. Douglas why he had stopped the delivery of that truck at Queen City Chevrolet. I told him that Joe Bonfield had informed me that he spoke to him, Jack Douglas, and asked for information about Nabcor as a result of reading an article, a derogatory article, about Nabcor in the newspaper. And he asked Jack Douglas about us. Jack Douglas checked with the -- told me yes, he recalls Joe Bonfield calling him about us, and he checked with the Philadelphia zone, Chevrolet zone, and he found out that we were bootlegging cars and we didn't have a fleet certificate, shouldn't be selling cars, and he informed Joe Bonfield not to deliver that truck to us.

Q Is there anything else to that conversation?

A Yes. I asked him what right he had to tell Joe Bonfield of Queen City Chevrolet what to do with their cars, and he said to me that since we weren't authorized dealers, we were bootlegging these cars as far as he was concerned; he shouldn't sell us that truck; it wasn't Chevrolet's policy to sell to bootleggers, and he wasn't going to approve it, period.

Q Is that your whole conversation with him?

A Yes. And he just cut it short, he didn't want to discuss it any further.

MR. PERSON: I have an Exhibit 484 for identivication.

(Pause.)

MR. KLEINBARD: I'm going to object to that.

THE COURT: May I see it.

I don't think there is any foundation at the present time. You can try to lay a foundation.

MR. PERSON: Yes.

THE COURT: All right.

THE COURT: What's 621?

MR. PERSON: That's a Nabcor purchase order dated November 11, 1969, ordered from Cerota Chevrolet, Elmer, New Jersey, and the name Mark A. Stolarski is on this order form.

THE COURT: What's the date of the purchase agreement?

MR. PERSON: July 15th.

THE COURT: Can you continue with questions while they are looking at it? I don't think they will be reading those things in depth, but it's a good idea that they see them.

(Handed to jury.)

BY MR. PERSON:

Q Did there come a time when you had any communications with any General Motors employee concerning this automobile that was ordered for Mr. Stolarski?

A Yes.

Q Could you state who that was?

A A Mr. Econ.

Q When did this communication take place?

A I guess it was some time early June of 1970.

Q Would you state what you said to him and what he said to you?

MR. KLEINBARD: May we have a side bar?

THE COURT: Sustained. This is what we talked about at length last night and again this morning. I really thought you would defer that until we got some foundational proof. I will be perfectly happy to have you postpone the thing. We can come back to this.

MR. PERSON: I was trying to go as far as we could without going into the other.

THE COURT: If you get into that -- you can't get into that. That's it.

MR. PERSON: I guess we should then leave this incident and it will be completed at some other time.

THE COURT: Fine. You can come back to it when we have the further items we talked about last night.

Q Do you know a person by the name of Bradwell?

A Yes.

Q Who is he?

A He was a broker that we had in Washington, D.C.

Q A Nabcor broker?

A Yes.

Q Do you know the name Joseph W. Askew?

A Yes. He was a customer of Mr. Bradwell who purchased an automobile from us through Mr. Bradwell.

Q Did he order an automobile?

A Yes.

Q Do you recall any communications with anyone from General Motors concerning this automobile?

A Yes. I had conversations with Mr. Lowe, Mr. Calan, Jack Calan.

Q Did you talk with any other persons from General Motors concerning this order?

A I believe there was another individual but I can't recall his name at the moment.

Q Which was the first conversation you can recall with a General Motors employee concerning this order?

A Mr. Lowe.

Q What was the order for?

A The order was for a Chevrolet Corvette, 1970 Chevrolet Corvette, which we ordered from Matt Slap Chevrolet.

MR. PERSON: I offer Exhibits 623 and 624.

MR. KLEINBARD: Your Honor, I would like to have some foundation laid with respect to the purchase order, the witness' personal knowledge thereof.

BY MR. PERSON:

Q Exhibit 624, Mr. Maiorana, do you know what that is?

A That is a purchase order, an order that we use to order automobiles from our supplying dealers.

Q Is this on a form that is regularly used by Nabcor?

A Yes.

Q And was it Nabcor's business -- was this form kept in the ordinary course of business by Nabcor?

A Yes.

Q Do you recall having seen that form before, that particular one?

A I believe I did, yes.

THE COURT: May I see it?

Q And can you state what it is?

THE COURT: I think he said. Let me just see it.

A An order signed by Jack Snyder ordering a car from the dealer here.

THE COURT: Okay, I will receive it. 624 is received.

How about 623?

MR. PERSON: 623, the purchase agreement?

MR. KLEINBARD: I have no objection.

THE COURT: All right, 623 is received.

(Plaintiffs' Exhibits 623 and 624 were received in evidence.)

THE COURT: All right, got ahead, Mr. Person.

(Mr. Person read from Plaintiffs' Exhibit 623 in evidence.)

xx (Mr. Person readfrom Plaintiffs' Exhibit 624 in evidence.)

BY MR. PERSON:

Q Who was Jack Snyder?

A Jack Snyder was the person in charge of the ordering and delivering of automobiles in our organization.

MR. PERSON: Just one last exhibit, 625.

MR. KLEINBARD: I object to this on the ground of hearsay.

THE COURT: May I see it?

Overruled. I'm going to receive it simply that, as I understand it, it provides part of the background leading up to some conversation. I will overrule the objection and receive it as background information for whatever he's going to testify to.

(Plaintiffs' Exhibit 625 was received in evidence.)

xx Q You stated that you had several conversations with GM employees. Was the first one with Mr. Lowe?

A Yes.

Q And could you state, how many conversations did you have with Mr. Lowe?

A I believe I had three conversations with Mr. Lowe.

Q And how many with Mr. Calan?

A I remember at least one. He may have had more, but I don't remember. I know of one, at least.

Q Could you state -- well, let me state

that this Exhibit 625 is dated May 15th. Do you know what year that would be?

A What exhibit is that?

Q I'm sorry. It says "Action Line.

"Dear Mr. Snyder:

"Please find attached as per our conversation yesterday an inquiry from Joseph" --

A 1969.

Q So it is May 15, 1969. Is this Exhibit 625 the Action Line letter -- do you recall having seen this?

A I believe I did. I'd like to look at the document.

THE COURT: The jury doesn't know what Action Line is. I assume you are going to ask the witness.

A Yes, I saw this.

Q Where was Mr. Bradwell's office located?

A In Washington.

Q Washington, D.C.?

A Yes.

THE COURT: What is Action Line?

Q And what is Action Line?

A Action Line is a column written by a

man by the name of Mr. Wright in the Washington Evening Start. It's one of these things where a consumer, if he has a complaint, he complains to this Action Line about whatever his problem is, and Action Line then contacts the business establishment to see if they could get some satisfaction for him.

Q Do you know where the customer Askew lived?

A I don't recall his address offhand. I believe he lived in the same area.

Q The purchase agreement states it's in Washington, D.C., Exhibit 623.

A Yes.

Q Now, with the first conversation you had with Mr. Lowe had you already received Exhibit 625?

MR. KLEINBARD: I object to the leading.

Q Well, do you know approximately what date you talked with Mr. Lowe for the first time?

A Oh, it was probably a month after or more after that letter.

Q So approximately what?

A Approximately a month after that letter came in.

Q In June of '69?

A Yes.

THE COURT: I think we have gotten a little tied up on the hearsay problem, but we have to make things intelligible. The documents indicate that Askew ordered his car from or through Bradwell September 1, '68, and then the documents indicate that Nabcor ordered the car from Matt Slap Chevrolet September 17, 1968. Now, were you at some point informed that the car had not been delivered?

THE WITNESS: Yes, we were --

THE COURT: Just answer my question.

I take it there was a problem of delivery?

THE WITNESS: We knew it was not delivered.

THE COURT: All right. And then did you get word that Mr. Askew had complained to Action Line?

THE WITNESS: Through this letter. He had made complaints, yes, to us prior.

THE COURT: What?

THE WITNESS: There were complaints made to us prior to that, and we were attempting to get this car for him.

THE COURT: All right. We have had the introduction of this Action Line letter. Were you informed that Mr. Askew had complained to Action Line?

THE WITNESS: As a result of this letter.

THE COURT: And that letter came to your attention?

THE WITNESS: Yes.

THE COURT: Why don't you read the letter to the jury.

MR. PERSON: Okay, fine.

(Mr. Person read from Plaintiffs' Exhibit 625 in evidence.)

THE COURT: Snyder was an employee of Nabcor, right?

THE WITNESS: Yes.

THE COURT: So this is a letter from the Action Line fellow to the fellow at Nabcor?

MR. PERSON: Correct.

THE COURT: Go ahead.

(Mr. Person read from Plaintiffs' Exhibit 625 in evidence.)

THE COURT: Did that lead to a conversation you had with Mr. Lowe of General Motors?

THE WITNESS: Yes.

THE COURT: Okay.

BY MR. PERSON:

Q Could you state, describe the conversation? And first of all, when was the conversation?

A Well, there were some events, prior events, that took place prior to this conversation which led up to this conversation.

Q Were these events described in the conversation?

MR. KLEINBARD: Your Honor, we have had a good deal of preliminary conversation about background. Can't we get the conversation with Mr. Lowe? It's the only thing that pertains here.

THE WITNESS: There is quite a bit of discussion that went on about this thing, your Honor.

THE COURT: I don't want to get into all the discussion. You have a right to testify as to your discussion with a representative of General Motors who is a defendant here, but a lot of other discussions, we just have endless problems about this. Let's get to the conversation with Mr. Lowe.

MR. PERSON: If I can ask one thing maybe it can clarify it.

THE COURT: Sure.

Q Did you have communications with Matt Slap Chevrolet before the Lowe conversation concerning this car?

A Yes.

Q Is that what you were referring to?

A Yes.

Q Okay, fine.

THE COURT: And it had not been delivered as of the time you talked to Mr. Lowe, is that right?

THE WITNESS: That's right. We were assured that --

THE COURT: It had not been delivered, is that right?

THE WITNESS: That's right.

THE COURT: That is why you called Mr. Lowe, right?

THE WITNESS: That's correct.

THE COURT: Let's go into the conversation with Mr. Lowe.

BY MR. PERSON:

Q Can you describe the conversation?

A I called Mr. Lowe as a result of Mr. Askew speaking to Mr. Lowe.

THE COURT: What did you tell him, what did he tell you?

THE WITNESS: I'm trying to get this into focus at this point, your Honor.

THE COURT: All right.

THE WITNESS: Taking things in this sequence makes it difficult for me.

THE COURT: Do you remember a conversation with Mr. Lowe or don't you?

THE WITNESS: Yes, I remember several.

THE COURT: Then tell it one at a time.

THE WITNESS: Okay.

As a result of Mr. Askew calling Mr.

Lowe and trying to get this automobile as per that letter --

MR. KLEINBARD: Could we just have the conversation, your Honor, please.

THE COURT: Would you be responsive.

THE WITNESS: I called --

THE COURT: You called Mr. Lowe. Then what was said?

THE WITNESS: That he would try to locate the automobile for us, and it seems that he had called the dealer --

MR. KLEIN: Is that part of the conversation, your Honor?

THE COURT: Let's take a recess and you refresh your memory.

(Recess.)

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(Jury not present.)

THE COURT: Do you have an application, Mr. Person?

MR. PERSON: Yes, your Honor. I wanted to, first of all, see what the position of Paul, Weiss is concerning this Leo Marcus or whatever.

THE COURT: Marcist?

MR. PERSON: It is Marcin -- to see whether or not they made any effort to trace him.

THE COURT: What about that?

MR. KAPLAN: We have done that many times. There is not now nor has there ever been any Leo Marcus or Marcist as far as we can determine.

THE COURT: Okay, that is the answer.

MR. PERSON: We have a witness who will testify to the contrary right now, your Honor.

THE COURT: It is up to him to testify.

MR. PERSON: It is with respect to the evidence. We have located him at the precise telephone number that was in the document, and I have somebody who has --

THE COURT: Who is he?

MR. PERSON: Anthony Maiorana has followed this up and he has found he is known to General Motors employees at that telephone number that was in the document.

THE COURT: Step up. Mr. Maiorana, what is the story? What do you have to say?

MR. ANTHONY MAIORANA: I just called and a girl answered. She says he didn't work there.

THE COURT: Where did you call?

MR. ANTHONY MAIORANA: He has the phone number, 313 --

THE COURT: Don't take the stand. I don't want to spend any time with this.

MR. ANTHONY MAIORANA: 313-556-5473.

THE COURT: 313 is what area code?

MR. ANTHONY MAIORANA: I believe that is Detroit.

MR. KAPLAN: Could I have the number again?

MR. ANTHONY MAIORANA: 313-556-5473.

THE COURT: And you called and whatwas that -- is that a General Motors office or what?

MR. ANTHONY MAIORANA: Yes. And a girl answered and she says he doesn't work here any more, he works now in the Detroit office. So I asked --

THE COURT: Office of what?

MR. ANTHONY MAIORANA: General Motors.

THE COURT: I'll tell you, at the noon hour you and Mr. Kaplan or somebody get together and you can call together and get this straightened out. It doesn't mean a lot to me right now.

MR. KAPLAN: Your Honor, we can straighten it out right now. It is this simple. When this whole episode came up months ago, we went to Econ and we went to the people out there or at least house counsel did and said, "Who is Marcus?" And they said, "The only person in the world it could be is Leo Marcin," the man who testified here already at the preliminary hearing, who now, I believe, is in the Detroit zone of Chevrolet, doing another job, and he has been here on the stand, and that is all I can say.

THE COURT: Mr. Maiorana, when did you place the call you are talking about?

MR. ANTHONY MAIORANA: This morning.

THE COURT: Are you sure it is not this Marcin fellow that was referred to?

MR. KLEINBARD: He hasnt mentioned what name he asked for.

MR. ANTHONY MAIORANA: I said I didn't know, and I said it either sounds like Marcus or Marcin.

THE COURT: Marcin. Well, it doesn't add

anything at all to what I know.

MR. PERSON: In other words, we have notes, Mr. Frank Maiorana's notes of a conversation with a Leo Marcin at that telephone number, and they are saying that there is no such person.

THE COURT: No.

MR. KLEINBARD: We didn't say that. We said there is no Leo Marcus.

MR. PERSON: In other words, through the confusion of the names it has been giving you the impression --

THE COURT: Who was Leo Marcin, as he testified to -- who was he? Who did he say he was? I don't remember.

MR. PERSON: He is a person that Econ would refer matters to from time to time that were --

THE COURT: He is another fellow in the same complaint department?

MR. PERSON: That's correct.

MR. KAPLAN: No, sir. He was in Chevrolet. He was in the complaint department in Chevrolet and he testified from that stand not 10 days ago.

MR. PERSON: Saying that he didn't remember.

THE COURT: I don't happen to remember what

THE COURT: I don't happen to remember what he said.

MR. PERSON: Saying he didn't remember.

MR. KAPLAN: He never talked to Mr. Frank Maiorana, never said anything like Maiorana claims he said to him or anyone else.

MR. PERSON: He doesn't remember and we have somebody who does.

THE COURT: Yes, but the question we are worrying about, if I am right, is again the same question of scope of employment, isn't that right?

MR. KLEINBARD: That's right, your Honor.

THE COURT: And Leo Marcin is -- what is the testimony?

MR. KAPLAN: In 1970 he was a coordinator in customer services for Chevrolet. He testified that he had no contact directly with dealers at all and that he knew nothing -- the question was --

THE COURT: What was his function?

MR. KAPLAN: To answer complaints like Econ, only relating to Chevrolets rather than anything --

THE COURT: What did he do about complaints?

MR. KAPLAN: He referred them to whoever was involved. For example:

"Q If a problem involving delivery were reported to you, what was your practice?

"A Transfer the communication directly to our distribution department.

"Q Did you ever tell anyone that requests for drop-shipments require approval of General Motors?

"A No."

THE COURT: That's his testimony. He was at Chevrolet. So he is a little closer to the scene than Econ.

MR. KAPLAN: There is one more question and answer, if I may.

"Q Did you ever have anything to do with drop-shipments or delivery of vehicles?

"A No, I don't get involved with drop-shipments or deliveries."

That was Mr. Marcin's testimony, and it was not General Motors who said the man's name was Marcus, it was Mr. Maiorana. We made every every effort to find out whoever it might be. Marcin was the likely one.

MR. PERSON: We gave the telephone number in the pretrial brief of a person named Leo and I misspelled it. They knew who it was.

2 THE COURT: Mr. Maiorana said he talked to Mr. Marcin.

MR. PERSON: Yes, your Honor, he did.

THE COURT: What will he say Mr. Marcin said to him?

MR. PERSON: Could you just state it, what you and Mr. Marcin talked about?

THE WITNESS: He said we shouldn't be selling automobiles, that General Motors had approved drop-shipments. He would try to work out something. The dealer had to agree to take a drop-shipment.

I called Wamsler at Shore Chevrolet. They agreed to do a courtesy delivery for $50. Called him back. He said he would see what he could do about it. We shouldn't be selling cars, it should be the dealer that is selling cars, but he would see if he could handle it.

The upshot of the whole thing was that he did not handle it. He delivered, had the car delivered not to Shore Chevrolet, who was willing to take a drop-shipment, a courtesy delivery, but delivered it to Elmer, New Jersey, instead, and this was the same situation that I had with Mr. Econ, your Honor, who had the primary responsibility, as a result of a letter that was written to the president of General Motors, of handling this complaint, and he said he would try to straighten out the matter, and he referred Mr. Marcin to this --

MR. KLEINBARD: May I ask, your Honor, when you look at the document which was tendered in Mr. Maiorana's examination before trial, I think you will see that the first reference is to M.S., which is Mark Stolarski, received a letter --

THE COURT: You are talking about this Exhibit 486, which is a letter from Mr. Stolarski to Cole,and some attached documents, and on the reverse side is some handwriting.

MR. KLEINBARD: Notes of Mr. Maiorana, and it is similar to notes we went into a little while ago.

It says, "M.S., received letter from Mr. Econ."

The reason I am reading it is because it is hard to follow.

"Of General Motors. Said he would forward to proper executive of GM for processing. He then received acall from Leo" -- and I think it says Marcin there, but that is how we found it --

THE COURT: It looks like M-a-r-c-i-n.

MR. KLEINBARD: Which is how we found him, although the pretrial referred to Marcus of General Motors, Chevrolet Division, phone Area Code 313, and so forth.

"He said, so far I feel we are still with that Stolarski. He said he suggests be able to help him if he could get name of dealer and auto number and copy of order."

Then there follow notes of three calls all on 6/17.

"Called Leo Marcin, who said he would get to Mr. Stolarski and have it drop-shipped to Shore Chevrolet."

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THE COURT: Call Leo Marcin. He said he would get the car?

MR. KLEINBARD: Yes, to Mr. Stolarski and have it drop-shipped to Shore Chevrolet.

THE COURT: I have got the original. It is easier for me.

MR. KLEINBARD: Then he goes on: "Call Stolarski", and he said Marcus asked him why he bought a car, and so forth, which is a conversation with Stolarski calling under any circumstances, and then the next one is: "Call Warmsler," so two out of these three are clearly conversations with people other than Marcin.

THE COURT: June 17th -- it is easier for me -- "Call Stolarski." He said Marcin asked him why he bought car through Bodiya and Nabcor. He seemed unhappy about him buying car through Nabcor.

Then June 17: "Call Mr. Warmsler at Shore Chevrolet. He said he would a courtesy delivery for $50."

Now all of this brings us back to the question of whether Mr. Maiorana can testify to what he says he will testify to about his talk with Marcin.

As I understand it, he would testify that

Marcin used the perennial phrase "bootlegger," which everybody is supposed to have now used, and he would also complain about the fact that -- it was some of the standard talk about Nabcor should not be selling cars, and so forth. Then he would also state the policy of General Motors about no drop-shipments without General Motors' approval. That's basically what he testified about, right?

MR. PERSON: Correct.

THE COURT: Taking one step at a time, he was at Chevrolet, so he is in a different position than Econ, but it seems to me he has absolutely no authority, there is nothing within his scope of employment, as far as anything shown, which wouldpermit him to speak to General Motors, as far as making any statement about calling Nabcor a bootlegger or indicating any adverse opinion about Nabcor buying from dealers or dealers selling to Nabcor. That is outside the scope of his employment.

Putting it another way: there is no showing that this is within the scope of his employment to say such a thing, voice such an opinion, voice such a characterization on behalf of General Motors.

As far as saying something about the policy of General Motors with respect to the drop-shipment, I think that since he is at Chevrolet, since he has put out to the public, so to speak, on these matters and the complaint was about drop-shipments, I am going to hold there is enough of a showing to indicate that it was within the scope of his employment to respond to the complaint and state what the procedure would be or would not be, or that General Motors would do or would not do about the specific subject of the complaint; that any alleged gratuitous insertions of the other kind, I think, is entirely out of his scope. That is my ruling.

MR. KAPLAN: Your Honor, if I may, there is one more point on this --

THE COURT: I think he is in a very much different position than Econ. Econ was not connected with Chevrolet.

MR. KAPLAN: If your Honor please, there is one other point that goes to the question of his competence. I would like to read to you a few lines of testimony at page 1060 of the hearing by Mr. Marcin.

"Q Do you know what the term 'drop-shipment' means?

"A Not really, sir."

THE COURT: That's going to be a question of credibility.

MR. KAPLAN: If your Honor please, that seems to me that the plaintiffs have the burden of showing the competency of the witness.

May I continue?

"Q Have you ever heard of one dealer selling a car to a customer and having the customer pick up the car in another dealership?

"A We never really dealt with that at all.

"Q You never heard of that transaction?

"A No."

That is the total sum and substance of the evidence on this man's competence in this field.

MR. PERSON: It is consistent --

MR. KAPLAN: Excuse me.

Other than Mr. Maiorana's hearsay, which I submit, plainly can't be considered on this point.

THE COURT: I think there is circumstantial evidence here.

No. 1, the man was in the complaint department of Chevrolet. Mr. Maiorana testified that he talked to this man. Taking as true that Mr. Maiorana testified to, it would be enough, in my view, to establish his competence and scope of his employment to respond to that particular complaint, not to talk a lot about other things but to respond to that particular complaint. I will permit it. That's my ruling.

I want it clearly understood, Mr. Maiorana, you are not permitted to go beyond that. You are not permitted to have Mr. Marcin voicing the allegations about bootlegging, and that kind of thing.

MR. PERSON: If he did it on more than one occasion I would like to reopen this and have Mr. Maiorana testify to that. Mr. Stolarski, I expect to have him as a witness. If he confirms that this statement was made I would ask that that would be enough to tip it on the other side where it shows a course of dealing, a history with this man.

THE COURT: For all I know that's Mr. Marcin's private opinion. I don't care whether he said it to Stolarski, to Maiorana, and to fifteen other people. The question is this: Can he make admissions on this crucial point on behalf of General Motors? It is again a question of the method of proof. You have a lot of evidence that is in the record. The issue has been raised. Mr. Maiorana has testified that people, such as Karney, Belcher and other people, have made admissions to him of their view about Nabcor being a bootlegger and shouldn't be in the business, and so forth; so the fat is in the fire and the jury has that from other people besides fellows like Econ and Marcin. The question is going to be one of credibility. Are they going to credit the statements of Mr. Maiorana quoting these people, or are they going to not? It is not as if it is not before the jury. It seems to me there has to be some care exercised so that we don't just have those words put in the mouths of any and all people connected with General Motors. There has to be a limit, otherwise it gets out of hand.

Let's go.

MR. KAPLAN: Your Honor, if it would be convenient now, I think we are prepared to respond on the question of drop-shipments.

THE COURT: I don't want to have the jury sitting out so long. Let's bring them back.

(Jury in box.)

MR. KLEINBARD: May we approach the side bar, your Honor?

(In open court.)

BY MR. PERSON:

Q We were talking about the first conversation with Mr. Lowe. Can you describe that?

A The first conversation with Mr. Lowe occurred some time in the middle or latter part of June, and -- I'm trying to think. We did get off on another subject about this and we didn't refresh our memory,

Q I'm only motioning you to talk up. That's all.

A I'm sorry, Mr. Person.

It was about -- I'm going to give this conversation in substance, Mr. Person. It was pertaining to this Corvette Chevrolet. Mr. Askew had called Mr. Lowe, that's what Mr. Lowe told me, and asked yim to help in getting this car located. Mr. Wright had called Mr. Lowe to get the car located for Mr. Askew.

THE COURT: Wright was the fellow at Action Line?

THE WITNESS: Yes.

THE COURT: So Lowe said Wright had called him to get the car located?

THE WITNESS: Right.

THE COURT: Proceed. What else was said?

THE WITNESS: He wanted to know who the dealer was and the order numbers and things like this. Some description was given of the car. I described what it was. The car had been ordered with brown leather upholstery. This seemed to be significant to Mr. Lowe. He felt he could locate the car as a result of this brown leather upholstery. There might be something in General Motors that leather upholstery is made in certain factories. I don't know. It is conjecture on my part.

I asked the question, how can you possibly locate the car through its upholstery?"

And he said, "We have ways of locating it because of that. Leather upholstery is manufactured in certain plants," or whatever. That he would be checking with the Philadelphia zone and a dealer and so on and so forth.

That was the substance of that first conversation as I recall it.

THE COURT: Did you give him the

name of the dealer?

THE WITNESS: Yes.

Q Is that all about the first conversation? I want to make sure you are complete because you did say you were summarizing.

A That's what I could give you in substance. That's what the conversation was about, the first conversation.

Q How long was it until you spoke with Mr. Lowe a second time?

A A few days maybe, a week. I don't recall.

Q Did he call you or did you call him?

A I don't recall, because there were conversations with other persons, with the dealer who was now backing off and saying that the car was --

THE COURT: Please. I don't understand you. You have been told repeatedly the ground rules. Your lawyer has told you that. If a dealer has something to say, that dealer can come to court. Dealer's views, statements and events occurring with the dealer, to the dealer's knowledge, that's not to be testified to